No. 03-14-00303-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

HWY 3 MHP, LLC,

Appellant,

v.

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.,

Appellee.

On Appeal from Cause No. D-1-GN-09-003607
in the 419th District Court, Travis County, Texas

BRIEF OF APPELLEE
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TO THE HONORABLE JUSTICES OF THE THIRD COURT OF APPEALS:

Appellee Electric Reliability Council of Texas, Inc. ("ERCOT") respectfully submits this brief in response to the brief of Appellant HWY 3 MHP, LLC ("HWY 3").

I. Statement of the Case

ERCOT filed the underlying lawsuit in order to recover a $1.25 million sum owed by HWY 3 for energy ERCOT provided to HWY 3's retail electric customers before HWY 3 defaulted on its collateral obligations and exited the market.[1] More than two years after ERCOT filed this lawsuit, HWY 3 filed a counterclaim alleging ERCOT was responsible for HWY 3's default and demise.[2] In response to HWY 3's counterclaim, ERCOT filed a plea to the jurisdiction on the basis that HWY 3's counterclaim fell squarely within the scope of the Public Utility Regulatory Act's ("PURA")[3] pervasive regulatory scheme governing the ERCOT market.[4] The trial court granted ERCOT's plea and dismissed HWY 3's counterclaim.[5] This interlocutory appeal followed.

[1] CR 3-76, Plaintiff's Original Petition.
[2] CR 161-68, Defendant HWY 3 MHL LLC's Original Counterclaim.
[3] Public Utility Regulatory Act, TEX. UTIL. CODE §§11.001-66.017.
[4] CR 169-174, Plaintiff's Plea to the Jurisdiction and Motion to Dismiss.
[5] CR 823, Order on Plea to the Jurisdiction.

II. Statement Concerning Jurisdiction

ERCOT disputes HWY 3's assertion that the Court has jurisdiction over this interlocutory appeal. HWY 3 claims that jurisdiction arises under section 51.014(a)(8) of the Texas Civil Practice and Remedies Code, which allows an interlocutory appeal when a court grants or denies a plea to the jurisdiction of a "governmental unit," as that term is defined in section 101.001(3)(D) of the Texas Tort Claims Act. As explained below in section VII.A., ERCOT is not a "governmental unit" as defined in the Texas Tort Claims Act because it is not an "institution, organ, or agency of government." Moreover, this appeal fails to satisfy the intended purpose of interlocutory review under section 51.014(a)(8), which is to resolve government claims of immunity from suit without requiring the government to fully litigate the lawsuit. Because ERCOT is not a governmental unit, its plea to the jurisdiction was based on exclusive agency jurisdiction, not sovereign immunity. This appeal therefore does not meet the requirements for interlocutory appellate jurisdiction and should be dismissed.

III. Statement Regarding Oral Argument

This case raises three important questions of first impression: (1) whether ERCOT is a governmental unit under the Tort Claims Act, and if so, (2) whether the PUC has exclusive original jurisdiction over claims against ERCOT arising under the ERCOT Protocols and (3) whether ERCOT is entitled to assert sovereign immunity from suit. ERCOT believes oral argument is likely to be helpful to the Court's evaluation of these issues.

IV. Issues Presented

1. Is ERCOT a "governmental unit" within the meaning of section 101.001(3) of the Tort Claims Act?

2. Does the Public Utility Regulatory Act give the Public Utility Commission exclusive original jurisdiction to resolve a dispute between ERCOT and one of its market participants concerning the interpretation of the rules governing ERCOT's market?

3. If the Court has jurisdiction over this appeal because ERCOT is a governmental unit within the meaning of the Tort Claims Act, does ERCOT's status as a governmental unit vest it with immunity from suit?

V. Statement of Facts

A. History and Role of ERCOT

ERCOT has long been responsible for ensuring the reliability of the electric system covering the majority of the State of Texas. ERCOT was first organized as an unincorporated association of investor-owned utilities in 1970 to comply with reliability requirements of the North American Electric Reliability Corporation ("NERC").[6] Pursuant to these requirements, ERCOT coordinated the dispatch of generation between the region's vertically integrated electric utilities to ensure reliability and promote efficiency. In 1990, ERCOT was formally established as a non-profit corporation under Texas law. ERCOT today remains a membership-based 501(c)(4) non-profit corporation.[7]

Until 2001, ERCOT's existence and operations were entirely a function of the private agreement between its member utilities. This status changed with the introduction of competition in the wholesale electric market. In 1995, the Texas Legislature began the transition to wholesale competition when it amended PURA to allow unaffiliated power producers "open access" to the utilities' transmission systems for the purpose of selling their generation at wholesale in the Texas electric market.[8] In 1999, the Legislature enacted SB7, which fully abandoned the

[6] ERCOT's history is described on its website at http://www.ercot.com/about/profile/history/.
[7] *See* http://www.ercot.com/about/profile.
[8] *See* Act of March 29, 1995, 74th Leg., R. S., ch. 9, § 1, 1995 Tex. Gen. Laws 31.

existing model of vertically integrated electric service by requiring utilities to "unbundle" into separate generation, transmission and distribution, and retail electric provider entities.[9] SB7's reforms aimed to foster competition in both the wholesale market (generators selling to retail providers) and the retail market (retail providers selling to end consumers).[10] Only the transmission and distribution segment of the industry continues to be subject to traditional cost-of-service rate regulation.[11]

The centerpiece of SB7 was the creation of Chapter 39 of PURA. The stated purpose of Chapter 39 is to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry."[12] SB7 reflects the Legislature's understanding that protecting the public interest in a competitive environment would require an independent entity to ensure open access to the transmission system and to account for and settle wholesale energy transactions in the new wholesale market.[13] Accordingly, SB7 introduced a requirement that the PUC certify an "independent organization" to perform these functions, in addition to the traditional grid reliability functions that ERCOT had already been providing

[9] *See* Act of May 27, 1999, 76th Leg., R. S., ch. 405, 1999 Tex. Gen. Laws 2543 ("SB7"); TEX. UTIL. CODE § 39.051(b) (requiring unbundling); *see also State v. Pub. Util. Comm'n*, 344 S.W.3d 349, 352-354 (Tex. 2011).
[10] *See State v. Pub. Util. Comm'n*, 344 S.W.3d at 352.
[11] *Id.*
[12] TEX. UTIL. CODE § 39.001(a).
[13] *See BP Chems., Inc. v. AEP Texas. Cent. Co.*, 198 S.W.3d 449, 451-52 (Tex. App.—Corpus Christi 2006, no pet.).

(e.g., balancing supply with demand in real-time and scheduling transmission outages).[14] In 2001, following a contested case proceeding, the PUC certified ERCOT as the independent organization for the ERCOT power region.[15]

As the independent organization, ERCOT is subject to a comprehensive scheme of PUC regulation detailed in section 39.151 of PURA. This section broadly grants the PUC "complete authority" over ERCOT's "finances, budget, and operations," and imposes specific oversight requirements concerning ERCOT's governance (including board structure), debt financing, budget, and operational accountability.[16] Section 39.151 also authorizes the PUC to "take appropriate action" in the event of the organization's failure to comply with its duties, including de-certification of the organization or assessment of administrative penalties.[17] This section also requires ERCOT to charge wholesale buyers and sellers a "system administration fee" to fund the organization's budget.[18] Thus, while ERCOT began as a purely private entity subject to the control of only its member utilities, the competitive evolution of the Texas

[14] *See* TEX. UTIL. CODE § 39.151(c).
[15] *See* Tex. Pub. Util. Comm'n, *Application of the ERCOT ISO for Certification as an Independent Organization to Perform Transmission and Distribution Access, Reliability, Information Exchange, and Settlement Functions*, Docket No. 22061 (Feb. 2, 2001) (Final Order).
[16] TEX. UTIL. CODE §§ 39.151(d), (d-1), (d-2), (d-3), (g), (g-1).
[17] TEX. UTIL. CODE § 39.151(d).
[18] TEX. UTIL. CODE § 39.151(e).

electricity market has naturally required ERCOT to assume a more formal public function with greater PUC control and oversight.

B. Rules of the ERCOT Market

In addition to establishing PUC control over ERCOT, section 39.151 of PURA grants the PUC authority to "adopt and enforce rules" governing an independent organization's reliability and market functions or to delegate that rulemaking authority to that independent organization "subject to commission oversight and review."[19] Although the PUC has adopted a number of rules concerning ERCOT and its wholesale market,[20] the majority of market standards are contained in the ERCOT Protocols.[21] The PUC approved the original version of the Protocols in 2001, prior to the implementation of retail customer choice on January 1, 2002.[22] Pursuant to authority delegated to ERCOT, and in accordance with the processes established under PUC Rules, the ERCOT Board of Directors has approved a number of revisions to the Protocols over the years. Nonetheless, the Protocols remain subject to the PUC's ongoing oversight and review.[23]

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[19] TEX. UTIL. CODE § 39.151(d).
[20] *See* PUC Subst. R. 25.361-366; 25.501-.508 (16 TEX. ADMIN. CODE §§ 25.361-.366; 25.501-.508).
[21] *See BP Chems., Inc.,* 198 S.W.3d at 452.
[22] *See* Tex. Pub. Util. Comm'n, *Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of the ERCOT Protocols,* Docket No. 23220 (June 4, 2001) (Order on Rehearing).
[23] *See Pub. Util. Comm'n v. Constellation Energy Commodities Group, Inc.*, 351 S.W.3d 588, 591 (Tex. App.—Austin 2011, pet. denied).

C. The Standard Form Agreement

Both ERCOT's and HWY 3's claims for breach of contract in the underlying litigation arise under the ERCOT Standard Form Market Participant Agreement (the "Standard Form Agreement"), which resides in Section 22, Attachment L of the May 2008 ERCOT Protocols.[24] The Standard Form Agreement is a non-negotiable, standard form contract that all market participants are required to sign as a condition for their participation and that establishes the basic legal relationship between ERCOT and the participant.[25] Among other things, the Standard Form Agreement requires the signatory to follow the ERCOT Protocols and to provide timely payment of all financial obligations.[26] It also establishes the rights of ERCOT and the signatory in the event of a default by either the market participant or ERCOT.[27]

D. HWY 3's Default on the ERCOT Market

Until August of 2008, HWY 3 was a PUC-registered Retail Electric Provider ("REP") in the ERCOT market, buying electricity at wholesale and reselling it to

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[24] CR190-204.

[25] ERCOT Zonal Protocols, May 1, 2008 (hereinafter, "Protocols") § 16.1 (requiring execution of Standard Form Agreement). Unless specifically noted, all citations to the Protocols in this brief refer to the May 1, 2008 version of the ERCOT Zonal Protocols, which are available at http://www.ercot.com/content/mktrules/protocols/library/2008/05/May_1,_2008_Protocols.pdf.

[26] CR195, Standard Form Agreement at 8.A.1 ("Failure to make payment or transfer funds, provide collateral or designate/maintain an association with a QSE (if required by the ERCOT Protocols) as provided in the ERCOT Protocols shall constitute a material breach . . . .").

[27] CR196-97, Standard Form Agreement at 8.B.

customers on a prepaid basis.[28] In late May 2008, wholesale power prices increased dramatically, and entities like HWY 3 that relied on the ERCOT real-time energy market to cover their customers' obligations were exposed to these prices.[29] This exposure required these entities to post additional collateral under the credit formulas in the ERCOT Protocols.[30] As determined by the PUC in two subsequent contested cases,[31] HWY 3 failed to meet the higher collateral requirement, which constituted a "material breach" under the express terms of the Protocols.[32]

On May 30, 2008, ERCOT provided written notice of this breach to HWY 3 and gave HWY 3 two business days—until June 3, 2008—to cure the breach, consistent with the process required under the Standard Form Agreement.[33] HWY 3 failed to provide the additional collateral by June 3, 2008 and thus did not cure

[28] CR162, Defendant HWY 3 MHL LLC's Original Counterclaim at 2.
[29] *Id.*; *see also* Rebecca Smith, *Sharp Power-Price Rise Hits Texas*, Wall St. J., May 30, 2008, available at http://online.wsj.com/news/articles/SB121210503608831079.
[30] *See* Protocols §§ 16.2.7.3, 16.2.7.4, attached at Appendix Tab G.
[31] *See* CR 453-460, Tex. Pub. Util. Comm'n, *Petition of Commission Staff to Revoke the Retail Electric Provider Certificate of HWY 3 MHP, LLC, d/b/a eTricity*, Docket No. 35775 (Aug. 14, 2008) (order revoking certification) (hereinafter, "Decertification Order"); CR 462-69, Tex. Pub. Util. Comm'n, *Notice of Violation by HWY 3 MHP of PUC Subst. R. 25.107(f)(2), Related to Financial Standards Required for Customer Protection, PUC Subst. R. 25.107(i)(8), Related to Requirements for Reporting and for Changing the Terms of a REP Certification, PUC Subst. R. 25.478(j)(2), Related to Refunding of Deposits and Voiding Letter of Guaranty, and PUC Subst. R. 25.43(n)(7), Related to Transition of Customer to POLR Service*, Docket No. 37152 (May 23, 2012) (order) (hereinafter, "Penalty Order").
[32] *See* Decertification Order at 3 Finding of Fact (FOF) 4; 7, Conclusion of Law (COL) 9; Penalty Order at 2, FOF 4; Standard Form Agreement at 8.A.1 ("Failure to make payment . . . as provided in the ERCOT Protocols shall constitute a material breach . . . .").
[33] Decertification Order, supra, n.31, at 3, FOF 3.

the breach within the requisite timeframe.[34] HWY 3's failure to timely cure the breach constituted a default under the Standard Form Agreement.[35] As required by the Protocols, and in accordance with the PUC's rules, ERCOT initiated a mass transition of HWY 3's customers to other REPs the next day, June 4, 2008.[36]

E. Subsequent Agency and Judicial Proceedings Against HWY 3

Shortly after HWY 3 defaulted on the market, the PUC initiated a proceeding to revoke HWY 3's certification as a REP.[37] Despite being provided notice of the proceeding, HWY 3 did not participate.[38] In August 2008, the PUC issued an order revoking HWY 3's REP certification.[39] That order included explicit findings of fact stating that HWY 3 had received timely notice of the breach and that it had violated the ERCOT Protocols by failing to post the required security.[40] HWY 3 did not seek rehearing or judicial review of the order.

In 2009, the Texas Attorney General sued HWY 3 to recover prepayments and deposits that HWY 3 failed to refund its customers when it left the ERCOT

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[34] *Id.* at 7, COL 9.
[35] CR195, Standard Form Agreement at 8.A.1 (failure to make timely payment "shall constitute an event of default ("Default") unless cured within two (2) Business Days after the non-breaching Party delivers to the breaching Party written notice of the breach"); Protocols § 16.2.9 ("If ERCOT receives a Late Payment which fully pays the Market Participant's payment or collateral obligation to ERCOT within two (2) Bank Business Days of the due date, ERCOT will waive the Payment Breach, except for ERCOT's Remedies for Late Payments, as set forth in Section 16.2.9.2, ERCOT's Remedies for Late Payments.").
[36] Decertification Order, supra, n.31 at 3, FOF 6.
[37] *Id.* at 1.
[38] *Id.* at 6, COL 2.
[39] *Id.* at 1-8; Ordering Paragraphs 1, 2.
[40] *Id.* at 3, FOF 2, 3, 4, COL 9.

market.[41] The litigation resulted in a settlement requiring HWY 3's principals to make payments to a restitution fund.[42]

In 2012, the PUC initiated an enforcement proceeding seeking administrative penalties for HWY 3's violation of PUC rules requiring refunds of customer payments and deposits.[43] The PUC ultimately adopted an order assessing a penalty of $1.44 million against HWY 3 and ordering HWY 3 to refund any amounts not already paid into the restitution fund.[44] HWY 3 challenged this order, and this separate suit remains pending in Travis County District Court.[45]

F. The Underlying Lawsuit

ERCOT filed suit in October 2009 seeking $1,239,080.88 that HWY 3 owed for energy ERCOT provided to serve HWY 3's retail customers prior to the default.[46] As alleged in ERCOT's petition, HWY 3's failure to pay for the energy breached the Standard Form Agreement's requirement to timely remit payments when invoiced.[47] Because HWY 3 never disputed any of the invoices and did not respond to ERCOT's letter demanding payment of the liquidated sum, ERCOT's

[41] CR471-79, Agreed Judgment, *State of Texas v. HWY 3 MHP, LLC, d/b/a eTricity, Larry Michael McBride, Marla Jo Hanley-Lobert, Scotty Ray Hanley, Louis Dale Saladino, Billy V. Stewart, and Donald Rit Hanley*, Cause No. 09-07753, 68th Judicial District Court, Dallas County, Texas (April 7, 2011).
[42] CR474, *Id.* at 4, para. 15.
[43] Penalty Order, supra, n.31 at 1.
[44] Penalty Order at 3, FOF 18; 6, 7, COL 15-17.
[45] *See HWY 3 MHP LLC v. Pub. Util. Comm'n*, No. D-1-GN-12-002380, 250th Judicial District Court, Travis County.
[46] CR3-76, Plaintiff's Original Petition; CR175-254, Plaintiff's Third Amended Petition (hereinafter, "Petition").
[47] CR177-78, Petition at 3-4.

petition also stated a claim for a suit on a sworn account.[48] Each of the unpaid invoices is attached to ERCOT's petition.[49]

More than two years after ERCOT filed suit, HWY 3 filed a counterclaim alleging that ERCOT had itself breached the Standard Form Agreement by failing to provide proper notice of HWY 3's breach of the collateral requirement, by failing to comply with the "further assurances" provision of the agreement, and by violating the ERCOT Protocols' non-discrimination provision and other provisions describing the calculation of collateral requirements.[50]

ERCOT filed a plea to the jurisdiction seeking dismissal of HWY 3's counterclaims on the basis that they fall within the scope of PURA's pervasive regulatory scheme governing the ERCOT market which gives the PUC explicit authority to "resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes."[51] ERCOT asserted that because HWY 3 did not address its concerns to the PUC within the 35 days required under PUC Rule 22.251, which establishes the process for challenging ERCOT conduct, HWY 3's counterclaims should be dismissed with prejudice.[52]

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[48] CR178, Petition at 4.
[49] CR219-254.
[50] CR161-68, Defendant's Original Counterclaim; CR381-89, Defendant's Amended Counterclaim (hereinafter, "Counterclaim").
[51] CR169-74, Plaintiff's Plea to the Jurisdiction and Motion to Dismiss.
[52] *Id.*

HWY 3 and ERCOT each filed multiple briefs on the plea.[53] The PUC filed an amicus curiae brief in support of ERCOT's plea to the jurisdiction, and HWY 3 submitted a response to the PUC's brief.[54] The matter was ultimately heard by Travis County District Judge Stephen Yelenosky. Following oral argument from ERCOT and HWY 3, Judge Yelenosky issued an order granting ERCOT's plea to the jurisdiction and dismissing HWY 3's counterclaims with prejudice.[55]

VI. Summary of the Argument

As a threshold matter, the Court should dismiss this interlocutory appeal because the statute on which HWY 3 bases its claim of appellate jurisdiction—Civil Practice and Remedies Code section 51.014(a)(8)—is inapplicable. That provision allows review of a trial court order that "grants or denies a plea to the jurisdiction by a "governmental unit" as that term is defined in Section 101.001." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). ERCOT is not a governmental unit under the Tort Claims Act because it is not an "institution, agency, or organ of government." Also, as the Supreme Court has previously recognized, the purpose of interlocutory review under section 51.014(a)(8) is to ensure prompt resolution of governmental claims of immunity from suit, and ERCOT made no such claim in the trial court because it is not a governmental unit.

[53] CR255-265, 266-380, 429-784, 796-808, 809-822.
[54] CR390-428, 785-795.
[55] CR823, Order on Plea to the Jurisdiction.

Nonetheless, if ERCOT is deemed to be a governmental unit for purposes of the Tort Claims Act, then it should accordingly enjoy immunity from suit, which would include immunity from HWY 3's suit. Consequently, if the Court were to determine that it has jurisdiction over this appeal, it should affirm the trial court's dismissal of HWY 3's claims on the independent basis that ERCOT is immune from suit.

Setting aside the issues of appellate jurisdiction and immunity, the trial court properly dismissed HWY 3's counterclaims because they fall well inside the scope of PURA's pervasive regulatory scheme concerning the operation of the ERCOT market. PURA explicitly gives the PUC "complete authority" over ERCOT, including the ultimate authority to adopt the rules governing the market as well as authority to "resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes." TEX. UTIL. CODE § 39.151(d-4)(6). HWY 3's counterclaims allege that ERCOT violated various ERCOT Protocols (including provisions of the Standard Form Agreement), and the trial court properly concluded that the PUC has exclusive original jurisdiction over these claims. If HWY 3 had any legitimate complaint about ERCOT's calculation of its collateral requirements or the sufficient and timely notice of HWY 3's breach, it was required to bring those complaints to the

PUC within the 35 days required under PUC Rule 22.251. Decisional law is clear that HWY 3's delay presents a jurisdictional bar to judicial relief.

HWY 3's insistence that the PUC can have no jurisdiction over a contract claim seeking money damages ignores that the Standard Form Agreement is not a private agreement negotiated by the signatory parties. It is part of the ERCOT Protocols, and consistent with the Supreme Court's decisions on point, the interpretation of its terms and the assessment of any appropriate remedies involves policy considerations that fall directly within the scope of the pervasive regulatory scheme set out in PURA establishing PUC control over ERCOT, its operations, and its rules.

While the PUC has exclusive jurisdiction over HWY 3's claims, it does not have exclusive jurisdiction over ERCOT's claim in the underlying lawsuit because (1) the PUC lacks any ability to grant ERCOT a money judgment upon which collection could be initiated and because (2) there is yet no bona fide dispute as to HWY 3's financial responsibility for the energy ERCOT provided. ERCOT's invoices requesting payment for the energy were validly issued to HWY 3 pursuant to ERCOT Protocols, and HWY 3 did not file any dispute with ERCOT or the PUC challenging any of those invoices. Because the invoices were, at the time of suit, valid, owing, and undisputed, ERCOT's only option was to file suit to reduce

the invoices to a money judgment so that it could eventually attempt to collect the funds owed.

The PUC cannot grant ERCOT an enforceable money judgment; nor can it issue an advisory opinion as to the validity of any particular invoice in the absence of any dispute. However, if HWY 3's pleadings eventually present a bona fide dispute as to the validity of this debt, and the defenses it may assert have not already been waived, the PUC would likely have exclusive or primary jurisdiction to decide any disputed issues. But even in that case, the trial court would retain jurisdiction over ERCOT's suit because only the trial court may issue a money judgment upon which collection may be initiated.

VII. Standard of Review

"Determining if an agency has exclusive jurisdiction requires statutory construction and raises jurisdictional issues. Thus, whether an agency has exclusive jurisdiction is a question of law [courts] review de novo." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002). Similarly, questions of sovereign immunity are reviewed de novo. *See Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009).

VIII. Argument and Authorities

A. The Court lacks jurisdiction over this appeal because ERCOT is not a "governmental unit" within the meaning of the Tort Claims Act.

A party may not appeal an interlocutory order unless explicitly authorized by statute. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). HWY 3 maintains that appellate jurisdiction is proper under Texas Civil Practice and Remedies Code section 51.014(a)(8), which authorizes review of an interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001." Although no court has previously decided whether ERCOT is a "governmental unit" for purposes of the Tort Claims Act, ERCOT submits that it cannot be considered a governmental unit as defined in the Act.

Moreover, allowing this interlocutory appeal would not serve the recognized purpose of section 51.014(a)(8), which is to allow prompt resolution of government claims of sovereign immunity. ERCOT's plea to the jurisdiction asserted only that the PUC has exclusive original jurisdiction over claims concerning the ERCOT Protocols. ERCOT asserted no claim of sovereign immunity, and the trial court considered no such ground for dismissal. However, if the Court determines that it does have jurisdiction over this appeal because ERCOT is a governmental unit within the meaning and purpose of Section

51.014(a)(8), the Court should also conclude, as a matter of deduction, that ERCOT is entitled to assert sovereign immunity as a bar to HWY 3's counterclaims.

1. ERCOT is not a "governmental unit" within the meaning of the Tort Claims Act.

ERCOT does not fall within the scope of the definition of "governmental unit" in the Tort Claims Act. The Act defines the term as follows:

> (3) "Governmental unit" means:
>
> (A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;
>
> (B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;
>
> (C) an emergency service organization; and
>
> (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the Legislature under the constitution.

TEX. CIV. PRAC. & REM. CODE § 101.001(3). HWY 3 does not contend that ERCOT falls within the scope of paragraph (A), (B), or (C), and none of those provisions would appear to apply on their face. Rather, HWY 3 argues that ERCOT is a governmental unit under paragraph (D) because its status and authority are derived from statute.

ERCOT does not dispute that its authority to ensure grid reliability and administer the ERCOT energy market is wholly derived from the PUC's designation of ERCOT as the "independent organization" responsible for those functions pursuant to section 39.151 of PURA. As discussed in part VII.B, below, section 39.151 describes in great detail the responsibilities of such an independent organization and establishes the PUC's exhaustive authority over that organization. In fact, the existence of this pervasive regulatory scheme was the very basis for ERCOT's plea to the jurisdiction in the trial court[56]. Thus, even while ERCOT's status as the statutory independent organization depends entirely on the PUC's designation of ERCOT for that purpose, one could reasonably conclude that ERCOT's status and authority are "derived from . . . laws passed by the Legislature" within the meaning of section 101.001(3)(D).

To be a governmental unit under paragraph (D), however, an entity must also be an "institution, organ, or agency *of government* . . . ." TEX. CIV. PRAC. &

[56] CR 171, ERCOT's Plea to the Jurisdiction.

REM. CODE § 101.001(3)(D). Without giving some meaning to this part of the definition, all private entities whose legal status and authority could plausibly be said to arise from statute would be considered governmental units under the Tort Claims Act. Under such a broad reading, all entities whose commercial or occupational status is conferred by a license granted pursuant to legislative authorization—child-care facilities, hospitals, insurance agencies, doctors, and plumbers, among many others—would be deemed governmental units. *See* TEX. HUM. RES. CODE § 42.021; TEX. HEALTH AND SAFETY CODE § 241.021; TEX. INS. CODE § 101.102; TEX. OCC. CODE § 155.001; TEX. OCC. CODE § 1301.351. ERCOT submits that the Legislature cannot have reasonably intended to sweep all of these private entities into the coverage of the Tort Claims Act.

Similarly, private entities that may have been granted special powers under statute would also come within a broad interpretation of "governmental unit." For example, electric utilities exercise rights of eminent domain by express statutory authorization and enjoy monopoly rights to serve customers under certificates of convenience and necessity issued by the Public Utility Commission. *See* TEX. UTIL. CODE §§ 181.004, 37.051. The fact that these private entities are charged with unique public functions is not understood to change their essential character as private entities. And it would be absurd to consider them governmental units solely by virtue of these special powers.

Nor does the fact that entities may be the subject of a "pervasive regulatory scheme" reasonably require that they be considered part of the government. For example, no court has previously held that a privately owned electric or telecommunications utility should be considered a governmental unit, even though such utilities have been found to be the subject of a pervasive regulatory scheme.[57] In fact, one court has held that even a corporation *created* by the Texas Legislature and subject to a similarly pervasive regulatory scheme governing workers' compensation insurance—the Texas Mutual Insurance Company—is not considered a government entity for purposes of establishing federal subject matter jurisdiction under ERISA.[58] In the same manner, ERCOT—a private 501(c)(4) non-profit corporation whose original incorporation *preceded* the legislation authorizing its public functions as the PUC-designated "independent organization"—is not an "institution, organ, or agency of government" and therefore does not meet the qualifications of a governmental unit under section 101.001(3)(D).

HWY 3's statement of the case notes a 2011 Texas Supreme Court decision that found a private, non-profit corporation to be a governmental unit for purposes of establishing appellate jurisdiction under section 51.014(a)(8). *See LTTS Charter*

[57] *See In re Southwestern Bell Telephone Co., L.P.*, 235 S.W.3d 619, 627 (Tex. 2007) (orig. proceeding); *In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004).
[58] *See Pridgen v. Tex. Mut. Ins. Co.*, No. Civ.A.3:04–CV–0189–G, 2004 WL 2070956 at *6 (N.D. Tex. Sept. 15, 2004).

School v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2011). *LTTS* held that an interlocutory appeal based on the grant or denial of an open-enrollment charter school's plea to the jurisdiction may properly be maintained because the school's status and authority are conferred by statute. The court did not expressly address the role of the phrase "of government" in section 101.001(3)(D), but whether a charter school could conceivably be part of government was not in question because, as the court specifically noted, the Education Code already explicitly grants a charter school status as a "governmental entity," a "political subdivision," and an instrumentality of "local government" for certain specified purposes. *See LTTS Charter School*, 342 S.W.3d at 77 (citing TEX. EDUC. CODE § 12.1053). But in ERCOT's case, there is no such similar declaration of government status in statute or any other law. Whether ERCOT can be conventionally be considered an "institution, organ, or agency of government" is an essential threshold consideration, and a conventional understanding of the term "of government" would not seem to include a private corporation that is not elsewhere recognized by the Legislature to be a part of government.

Furthermore, in the lone case that cites to *LTTS* in evaluating the permissibility of interlocutory appellate review, the Thirteenth Court of Appeals similarly relied upon other statutory indicators of government status in determining that a workforce development board should be considered a "governmental unit."

See Arbor E&T, LLC v. Lower Rio Grande Valley Workforce Dev. Bd., Inc., No. 13-13-00139-CV, 2013 WL 8107122 (Tex. App.—Corpus Christi Dec. 5, 2013, no pet.) ("We conclude that local workforce development boards are governmental units under the TTCA for the following reasons: . . . (7) the fact that the "Texas Legislature considers local workforce development boards to be "governmental" in nature under other laws outside Chapter 2308 of the Texas Government Code.").

While ERCOT's status and authority as the PUC-designated "independent organization" arise entirely under PURA section 39.151, that statute does not suggest any legislative intention to make ERCOT part of the government, unlike the scheme in *LTTS*. Nothing in PURA states or even suggests that ERCOT is a "government body," a "governmental entity," a "political subdivision," or a part of "local government" for any purpose, unlike the statutes governing charter schools. In fact, PURA implicitly recognizes that ERCOT is not part of government because it specifically imposes certain open meeting requirements on ERCOT that would be redundant of obligations applicable to governmental bodies under the Open Meetings Act. *See* TEX. UTIL. CODE § 39.1511; TEX. GOV'T CODE §§ 551.001- .146. Furthermore, unlike the charter schools in *LTTS*, ERCOT is not funded in any part by state or local tax funds. ERCOT's funding is rather more akin to that of private electric utilities whose revenues are determined by rates set by the PUC. In the same manner, PURA requires ERCOT to cover its costs

through a PUC-established rate—a "system administration fee"—charged to wholesale buyers and sellers of electricity. *See* TEX. UTIL. CODE § 39.151(e). In at least these meaningful respects, ERCOT's governing scheme is different from the laws governing the charter schools at issue in *LTTS*.

Accordingly, while ERCOT's "status and authority . . . are derived . . . from laws passed by the Legislature," ERCOT is not a part of government under any conventional understanding of that term and PURA evinces no legislative intention to treat ERCOT as a part of government.

2. The purpose of section 51.014(a)(8) is to ensure prompt appellate review of a governmental unit's claims of immunity, and ERCOT made no such claim in the trial court.

Exercising jurisdiction over this appeal would also be inconsistent with the purpose of allowing interlocutory review of orders granting or denying government pleas to the jurisdiction. The Supreme Court has observed that the purpose of interlocutory review under section 51.014(a)(8) is to ensure that government claims of sovereign immunity can be resolved without requiring the government to fully litigate the underlying case:

> Section 51.014(a)(8) was designed to reduce litigation expenses for all parties involved in suits against state entities *by resolving the question of sovereign immunity* prior to suit rather than after a full trial on the merits. . . . [T]he purpose of the provision was to allow state agencies to more quickly ascertain whether or not a trial court could assert jurisdiction over a dispute.

Texas A & M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 845 (Tex. 2007) (emphasis added) (citing House Comm. On Civil Practices, Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997); Debate on Tex. S.B. 453 Before the House Comm. on Civil Practices, 75th Leg., R.S. (1997) (statement of Rep. Pete Gallego)).

HWY 3's appeal does not serve the purpose of interlocutory review under section 51.014(a)(8) because ERCOT never made any claim of sovereign immunity in the trial court. Its plea to the jurisdiction was based entirely on the PUC's exclusive original jurisdiction under PURA to decide disputes concerning ERCOT's market rules.[59] Allowing this appeal to proceed would plainly ignore the purpose of interlocutory review under section 51.014(a)(8). The Court should conclude that ERCOT is not a "governmental unit" and that an interlocutory appeal is improper in this case.

If, however, the Court does determine that ERCOT is a "governmental unit" for purposes of the Tort Claims Act, it should also recognize as a consequence ERCOT's right to assert sovereign immunity—including immunity from suit—consistent with the Legislature's aim in defining "governmental unit" in the Tort Claim Act (*see* part VII.C., below), and consistent with the Legislature's purpose in granting interlocutory review of a governmental unit's plea to the jurisdiction.

[59] CR171, Plaintiff's Plea to the Jurisdiction at 3.

If the Court has jurisdiction over this appeal because ERCOT is a "governmental unit," then it follows that ERCOT should be entitled to assert immunity from suit.

B. The trial court properly determined that the Public Utility Commission has exclusive original jurisdiction over HWY 3's counterclaims because they concern the proper interpretation and application of the ERCOT Protocols and therefore fall within the pervasive regulatory scheme establishing PUC authority over the ERCOT market.

If the Court concludes that it has jurisdiction over this appeal, it should affirm the trial court's order dismissing HWY 3's counterclaims. The trial court properly determined that it had no subject matter jurisdiction over these claims that raise matters concerning the appropriate interpretation and application of the ERCOT Protocols and therefore fall within the scope of PURA's pervasive regulatory scheme which gives the PUC comprehensive oversight over ERCOT's operations and explicitly authorizes the PUC to decide controversies between market participants and ERCOT.

Contrary to HWY 3's representation, the controversy at issue does not arise from a mere private contract, but rather from ERCOT's Standard Form Market Participant Agreement—a standard-form, generally applicable, non-negotiable agreement that establishes the basic terms of participation in the ERCOT market. This agreement is a part of the Protocols (Section 22, Attachment L), and its terms are thus determined entirely through the ERCOT Protocol revision process pursuant to the PUC's delegation of its rulemaking authority. When a conflict

arises that requires the interpretation of that agreement—as with any other section of the Protocols—that interpretation should be made as a matter of public policy by the agency responsible for the administration of the regulatory scheme at issue.

1. The Legislature has created a pervasive regulatory scheme giving the Public Utility Commission plenary authority over ERCOT's operations and rules and explicit authority "to resolve disputes between ERCOT and its market participants."

Under the doctrine of exclusive jurisdiction, the Legislature grants an administrative agency the sole authority to make an initial determination in a dispute. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). In deciding whether an agency has exclusive jurisdiction, courts consider "whether the Legislature has enacted express statutory language indicating that the agency has exclusive jurisdiction or, if not, whether a 'pervasive regulatory scheme' nonetheless reflects legislative intent that an agency have the sole power to make the initial determination in the dispute." *Vista Med. Ctr. Hosp. v. Tex. Mut. Ins. Co.*, 416 S.W.3d 11, 30 (Tex. App.—Austin 2013, no pet.).

PURA does not explicitly state that the PUC has "exclusive original jurisdiction" over claims involving the ERCOT Protocols. But the Legislature has established a pervasive scheme of plenary PUC regulation of the ERCOT independent organization, the ERCOT market, and ERCOT's operations, and has

also explicitly authorized the PUC to resolve related disputes and to establish rules to facilitate the resolution of those disputes.

a. PURA establishes comprehensive PUC authority over ERCOT, its operations, and its rules.

Section 39.151 of PURA gives the PUC comprehensive authority over all facets of ERCOT's statutory functions:

> An independent organization certified by the commission is directly responsible and accountable to the commission. The commission has *complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties*. The organization shall fully cooperate with the commission in the commission's oversight and investigatory functions. The commission may take appropriate action against an organization that does not adequately perform the organization's functions or duties or does not comply with this section, including decertifying the organization or assessing an administrative penalty against the organization.

TEX. UTIL. CODE § 39.151(d) (emphasis added).[60]

This general grant of authority is supplemented by a number of specific oversight requirements. Section 39.151(d-1) requires the PUC to review and approve ERCOT's budget at least biennially and authorizes the PUC to "approve, disapprove, or modify any item included in a proposed budget." Section 39.151(d-2) requires the PUC to oversee ERCOT's debt financing. Section 39.151(d-3)

[60] For the Court's convenience, the text of section 39.151 of PURA is attached at Appendix Tab A.

authorizes the PUC to establish performance measures and review ERCOT's achievement of them. Section 39.151(d-4) provides that the PUC may require reports, prescribe a system of accounts, conduct audits and inspections of organization's records and facilities, assess administrative penalties, and resolve disputes involving ERCOT and an affected person.

Section 39.151 also explicitly vests the PUC with authority to establish rules governing reliability and market operations, or to delegate that authority to ERCOT:

> The commission shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules. Any such rules adopted by an independent organization and any enforcement actions taken by the organization are subject to commission oversight and review.

Id. Section 39.151(i) similarly recognizes that the PUC possesses ultimate enforcement authority over all operating standards in the ERCOT market when it authorizes the PUC to "delegate authority to the existing independent system operator in ERCOT to enforce operating standards within the ERCOT regional electrical network and to establish and oversee transaction settlement procedures." PURA § 39.151(i).

Pursuant to its rulemaking authority, the PUC has adopted a number of detailed rules to facilitate its exercise of authority over ERCOT and the markets

administered by ERCOT. *See* 16 TEX. ADMIN. CODE §§ 25.361-.365 (detailing ERCOT's functions, responsibilities, governance, rulemaking authority, budget, accounting requirements, and creating an "independent market monitor" to guard against market power abuse in ERCOT markets); §§ 25.501-.508 (establishing, among other things, the basic ERCOT wholesale market framework, a scheme of oversight and enforcement of market rules, specific restrictions on the exercise of market power in ERCOT, and mechanisms for ensuring resource adequacy in ERCOT).

The ERCOT Protocols themselves are also an integral part of the regulatory framework under the PUC's control. The Protocols, which currently fill nearly 1200 pages, provide specific details on market operations, registration, settlement, metering, transmission planning, and other activities.[61] The Court has previously determined that the Protocols are considered administrative rules and that the PUC is entitled to deference in its interpretation of those rules—in part because the PUC's interpretation of those rules becomes part of those rules. *Pub. Util. Comm'n v. Constellation Energy Commodities Group, Inc.*, 351 S.W.3d 588, 595 (Tex App.—Austin 2011, pet. denied). Thus, the ERCOT Protocols come within the scope of the PUC's regulatory authority under section 39.151.

[61] The current version of the Protocols can be found on ERCOT's website at http://www.ercot.com/mktrules/nprotocols/lib.

b. PURA specifically authorizes the PUC to resolve disputes between market participants and ERCOT.

Apart from granting the PUC comprehensive authority over ERCOT's operation and its market rules, section 39.151 of PURA also provides that "[t]he commission may . . . resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes." TEX. UTIL. CODE § 39.151(d-4)(6). This language reflects a legislative determination that the PUC is the appropriate tribunal when disagreements arise about the interpretation and application of the ERCOT Protocols and related PUC rules.

In accordance with this authorization, the Commission has adopted procedures providing for the prompt resolution of disputes involving ERCOT. PUC Procedural Rule 22.251, entitled "Review of Electric Reliability Council of Texas (ERCOT) Conduct," prescribes the process by which an affected market participant may complain to the PUC about ERCOT conduct. *See* 16 TEX. ADMIN. CODE § 22.251.[62] The rule authorizes a market participant to submit a complaint about any action taken by ERCOT:

> Any affected entity may complain to the commission in writing, setting forth any conduct that is in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order or rule of the commission, or of any

[62] For the Court's convenience, the text of PUC Procedural Rule 22.251 is attached at Appendix Tab B.

> protocol or procedure adopted by ERCOT pursuant to any law that the commission has jurisdiction to administer.

PUC PROC. R. 22.251 (16 TEX. ADMIN. CODE § 22.251). The rule requires that any person, before filing a complaint, must first exhaust any administrative remedies at ERCOT (including complying with ERCOT's alternative dispute resolution process). Any complaint must be submitted within 35 days of the date of the relevant ERCOT conduct (or, if applicable, the conclusion of the ERCOT alternative dispute resolution process). *Id.* at 22.251(d). A party may request that the ERCOT action be suspended pending a determination on the complaint upon a showing of good cause. *Id.* at 22.251(i).

Upon a determination that a complaint has merit, the rule allows the PUC to grant any relief it has the authority to provide:

> Where the commission finds merit in a complaint and that corrective action is required by ERCOT, the commission shall issue an order granting the relief the commission deems appropriate, including, *but not limited to*:
>
> (1) Entering an order suspending the conduct or implementation of the decision complained of;
> (2) Ordering that appropriate protocol revisions be developed;
> (3) Providing guidance to ERCOT for further action, including guidance on the development and implementation of protocol revisions; and
> (4) Ordering ERCOT to promptly develop protocols revisions for commission approval.

PUC PROC. R. 22.251(o) (emphasis added). Consistent with the rule's recognition that the list of specified remedies is not intended to be exhaustive, the PUC has

previously granted relief beyond the rule's specifically enumerated remedies when it has determined that ERCOT has improperly applied its Protocols.[63]

c. The regulatory framework in PURA section 39.151 is a pervasive regulatory scheme that demonstrates a legislative intention to establish the PUC's exclusive original jurisdiction over HWY 3's claims.

The PUC's exhaustive statutory authority over the ERCOT markets is precisely the sort of framework that the Supreme Court and this Court have held constitutes a "pervasive regulatory scheme" justifying a finding of exclusive agency jurisdiction. In the case of *In re Entergy Corp.*, 142 S.W.3d 316 (Tex. 2004), the Supreme Court held that the PUC had exclusive jurisdiction to resolve a dispute concerning an agreement reached between ratepayers and an electric utility in a prior PUC proceeding. *Entergy*, 142 S.W.3d at 323. The agreement at issue required the utility to share certain savings with ratepayers in future rate proceedings. *Id.* In concluding that the PUC had exclusive jurisdiction to construe the terms of the agreement, the court relied on language in Chapter 31 of PURA expressing a legislative intention "to establish a comprehensive and adequate regulatory system for electric utilities." *Id.* The court reasoned that "[t]he Legislature's description of PURA as 'comprehensive,' coupled with the fact that

[63] *See, e.g.,* Tex. Pub. Util. Comm'n, *Appeal and Complaint of Longhorn Energy LP and West Oaks Energy LLC Concerning ERCOT Decision to Conduct Market Resettlement*, Docket 39433 (Mar. 7, 2012) (Final Order) (granting complaint submitted under Rule 22.251 and reversing resolution of ERCOT Board of Directors requiring resettlement of market that would remove certain de-energized buses from ERCOT's Congestion Revenue Rights network model).

PURA regulates even the particulars of a utility's operations and accounting, demonstrates the statute's pervasiveness." *Id.* The court also relied on the fact that PURA specifically granted the PUC "exclusive original jurisdiction over the rates, operations, and services of an electric utility." *Id.* at 323-24. Since the dispute raised an issue bearing on the utility's rates, the issue fell within the scope of the PUC's exclusive authority to resolve the dispute as a matter of policy. *Id.*

In the case of *In re Southwestern Bell Telephone Co., L.P.*, 235 S.W.3d 619 (Tex. 2007) (orig. proceeding), the Supreme Court considered whether a trial court could properly entertain a ratepayer suit challenging a telecommunications utility's authority to recover universal service fund (USF) charges. The ratepayers sought a declaration that recovery of those charges violated a PURA provision under which the utility's rates were to have been temporarily capped. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 623. In holding that the PUC had exclusive jurisdiction over this dispute, the court noted a number of provisions that, when read together, demonstrated an intention to establish a pervasive regulatory scheme under the PUC's exclusive authority. *Id.* at 625. Specifically, the court found the following statutory language persuasive:

- A grant to the PUC of "exclusive original jurisdiction over the business and property of a telecommunications utility" and "general power to regulate and supervise such utilities";
- A requirement that the PUC "adopt and enforce rules requiring local exchange companies to establish a universal service fund";

- A requirement that utilities must fund the USF charge "in accordance with procedures approved by the commission";

- A delegation to the PUC of "general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction";

- A requirement that the PUC must "adopt eligibility criteria and review procedures, including a method for administrative review, the commission finds necessary to fund the universal service fund" and "adopt rules for the administration of the universal service fund" and to "act as necessary and convenient to administer the fund";

- PUC authority to "resolve disputes between a retail customer and a billing utility, service provider, [or] telecommunications utility";

- PUC authority to investigate an alleged violation, order a service provider to produce information or records, and require a service provider to "refund or credit overcharges or unauthorized charges with interest"; and

- PUC authority to seek an injunction against a utility prohibiting acts that violate PURA and to assess administrative penalties against that utility.

Id. at 625-26 (statutory citations omitted).

Similar to the regulatory schemes at issue in *Entergy* and *Southwestern Bell*, PURA also gives the PUC exclusive original jurisdiction to determine matters of reliability and market operations entrusted to ERCOT. Just as PURA provided "comprehensive" authority over the rates of electric utilities, justifying dismissal of the ratepayers' suit in *Entergy*, PURA also explicitly affords the PUC "complete authority to oversee . . . the independent organization's . . . operations" so as "to

ensure that the organization adequately performs the organization's functions and duties." TEX. UTIL. CODE § 39.151(d). And just as PURA's framework for the regulation of telecommunications utilities and the universal service fund at issue in *Southwestern Bell* provided a number of specific grants of authority to the PUC, including a delegation of authority to adopt rules governing the administration of that fund, PURA similarly includes a number of provisions granting the PUC specific authority to regulate all aspects of ERCOT and its operations and express authority to adopt rules governing these matters. TEX. UTIL. CODE §§ 39.151(d), (d-1), (d-2), (d-3), (d-4), (i).

Chapter 39 of PURA also gives the PUC dispute resolution authority similar to that noted by the court in *Southwestern Bell*. In finding exclusive PUC jurisdiction over the plaintiffs' allegations, the court cited to the PUC's statutory authority to "resolve disputes between a retail customer and a . . . telecommunications utility." *See In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 625-26 (citing TEX. UTIL. CODE § 17.157(a)). Similarly, the PUC's authority under Chapter 39 to "resolve disputes between an affected person and an independent organization" also demonstrates an unequivocal legislative intention that the PUC have the initial opportunity to hear any disputes arising under this statutory scheme. *See* TEX. UTIL. CODE § 39.151(d-4)(6).

HWY 3 argues that explicit statutory language granting "exclusive original jurisdiction" over disputes is a necessary condition to a determination that an agency has exclusive jurisdiction to resolve a dispute. This is incorrect. The Supreme Court has recognized on multiple occasions that exclusive original jurisdiction may be conferred not only by express provision but also by "a pervasive regulatory scheme indicat[ing] that [the Legislature] intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed." *See Employees Ret. Sys. of Texas v. Duenez*, 288 S.W.3d 905, 909 (Tex. 2009); *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d at 625 (Tex. 2007); *In re Entergy Corp.*, 142 S.W.3d at 323; *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006); *Subaru of Am., Inc.*, 84 S.W.3d 212, 222 (Tex. 2002). Tellingly, HWY 3's brief never once mentions the term "pervasive regulatory scheme," even while ERCOT's plea to the jurisdiction and its three briefs in the trial court relied upon this explicit ground for exclusive jurisdiction.

Finally, HWY 3 asserts that the absence of published opinions finding exclusive PUC jurisdiction over ERCOT-related disputes proves that the PUC lacks jurisdiction over such claims.[64] But HWY 3 fails to note that ERCOT has been party to only three appeals in which an opinion has been issued, and none of

[64] Brief of Appellant HWY 3 MHP, LLC at 14.

these cases involved any question of the PUC's exclusive jurisdiction.[65] What is not surprising is that there is yet no law on this issue, as it is indeed a matter of first impression.

2. Recognizing the PUC's exclusive jurisdiction to resolve this dispute is critical to ensuring the proper implementation of the Legislature's regulatory scheme.

Deference to the PUC is important to avoid disrupting the agency's plenary oversight of the relevant regulatory framework—and this is especially true where that framework is particularly complex. *See Constellation*, 351 S.W.3d at 629–30 (holding, in case concerning PUC construction of ERCOT Protocols, that "deference [to the PUC] is particularly important in a complex regulatory scheme like the Public Utility Regulatory Act.").

In *Constellation* this Court recognized that one reason the PUC's interpretation of the ERCOT Protocols is entitled to deference is that the ERCOT Protocols are essentially PUC rules. *See Constellation*, 351 S.W.3d at 594-95. The Court recognized the principle that courts "will generally uphold an agency's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule." *Id.* at 595. When an agency interprets its own rules, judicial deference is appropriate because it may be presumed the agency

[65] *See In re Texas Commercial Energy*, 607 F.3d 153 (5th Cir. 2010); *Pub. Util. Comm'n v. Constellation Energy Commodities Group, Inc.*, 351 S.W.3d 588 (Tex. App.—Austin 2011, pet. denied); *Elec. Reliability Council of Texas, Inc. v. Met Ctr. Partners-4, Ltd.*, No. 03-04-00109-CV, 2005 WL 2312710 (Tex. App.—Austin Sep. 22, 2005, no pet.).

knows best what it meant when it adopted the rule. Similarly, as between the PUC and the courts (irrespective of whether findings would be made by a judge or jury), the PUC can be expected to know best the regulatory purposes served under various competing interpretations of a particular Protocol provision.

The need for a PUC determination is especially compelling in this case. HWY 3 challenges ERCOT's interpretation and application of standards for determining a qualified scheduling entity's financial exposure and minimum collateral amounts.[66] These credit issues fall squarely within the PUC's authority to oversee ERCOT's operations.[67] Creditworthiness of market participants is critical to the effective operation of an electric market; entities that do not maintain sufficient security can impose substantial financial harm on consumers or other market participants.

In fact, ERCOT's authority to establish credit parameters is explicitly provided in the PUC's rule governing ERCOT's core functions. *See* P.U.C. SUBST. R. 25.361(B)(2) (16 TEX. ADMIN. CODE § 25.361(b)(2)) (tasking ERCOT with responsibility for "assessing creditworthiness of market participants and establishing and enforcing reasonable security requirements in relation to their responsibilities under ERCOT rules."). Any allegation that ERCOT's standards

[66] *See* HWY 3 MHP, LLC's Amended Counterclaim at 6, para. 16, 24, 28.
[67] *See* TEX. UTIL. CODE § 39.151(d).

are unreasonable or that ERCOT abused its discretion in applying them would most appropriately be determined by the entity that created this rule—the PUC.

Moreover, under the relevant collateral provisions cited in HWY 3's counterclaims—namely Protocol sections 16.2.7.3 and 16.2.7.4[68]—ERCOT must determine the value of a market participant's Estimated Aggregate Liability ("EAL") and Net Load/Resource Imbalance Liability ("NLRI") in determining the total collateral required, and when appropriate, it may even elect to use some value other than the EAL or NLRI calculated under the specified formula.[69] Evaluating any challenge to ERCOT's application of its discretion in calculating EAL or NLRI naturally requires an understanding of the principles underlying this credit framework.

Furthermore, even those of HWY 3's counterclaims that might facially appear to raise only matters of contract interpretation also warrant application of the PUC's expert judgment. The Standard Form Agreement is part of the ERCOT Protocols and therefore comes within the PUC's regulatory province. As noted in part VII.B.4.a., below, this Court has held that when a contract has an

[68] For the Court's convenience, the text of these sections is attached at Appendix, Tab G.

[69] *See* ERCOT Protocols § 16.2.7.4 ("To the extent that ERCOT, using commercially reasonable measures, determines that the EAL so calculated does not adequately match the financial risk to the MPs in the market in the ERCOT Region, ERCOT may specify a larger or smaller EAL than would be produced by the use of the above formula."); § 16.2.7.4 ("To the extent that ERCOT, using commercially reasonable measures, determines that the NLRI as calculated above does not adequately match the financial risk to Market Participants, ERCOT may specify a larger or smaller NLRI than that produced by using the above-referenced formula."). These sections are attached at Appendix Tab G.

administrative character (as does the Standard Form Agreement), the PUC is not bound by the strict terms of that contract in fashioning appropriate relief. *See AEP Texas N. Co. v. Pub. Util. Comm'n of Texas*, 297 S.W.3d 435, 446 (Tex. App.—Austin 2009, pet. denied).

Allowing parties to circumvent PUC review of matters that require the interpretation of ERCOT Protocols would thwart the Legislature's goal of consolidating expertise on these matters in one regulatory body. Dismissing HWY 3's claims in favor of requiring such claims to be brought to the PUC is the only way to give appropriate regard to the Legislature's establishment of this "pervasive regulatory scheme."

Moreover, HWY 3's assertion that the Court has original jurisdiction over its claims simply because it alleges a breach of contract would establish a dangerous precedent. Sections 5.A. and 6.A. of the Standard Form Agreement obligate the signing participant and ERCOT, respectively, to "comply with, and be bound by, all ERCOT Protocols." Under HWY 3's reasoning, any market participant aggrieved by any ERCOT decision could immediately sue ERCOT for breach of the Standard Form Agreement and proceed to a jury trial on the contested issues without following either the required ERCOT-level dispute resolution process or the PUC appeal process.

This result would facially contradict Section 10.A. of the Standard Form Agreement, which requires that "[i]n the event of a dispute, including a dispute regarding a Default, under this Agreement, Parties to this Agreement shall first attempt resolution of the dispute using the applicable dispute resolution procedures set forth in the ERCOT Protocols."[70] It would also conflict with the PUC's express statutory authority to "resolve controversies between affected entities and ERCOT,"[71] as the PUC would be powerless to exercise its dispute resolution authority in any case in which the complaining party went directly to court. It is simply unreasonable to suggest that the Legislature intended this illogical result. Pursuant to this statutory authority, the PUC has created the process for appealing ERCOT decisions in Procedural Rule 22.251, and a market participant must follow that process as a condition for seeking judicial review.

3. HWY 3 misconstrues the PUC's explicit discretion to resolve disputes under section 39.151(d-4)(6).

HWY 3 argues that the use of the word "may" in section 39.151(d-4)(6) conclusively demonstrates that jurisdiction was not intended to be exclusive. *See* TEX. UTIL. CODE § 39.151(d-4)(6) ("The commission may . . . resolve disputes between an affected person and an independent organization . . . ."). ERCOT

[70] CR 12-26, Standard Form Agreement.
[71] TEX. UTIL. CODE § 39.151(d-4)(6).

agrees that "may" suggests discretion,[72] but its use here likely reflects only a legislative understanding that the PUC does not have jurisdiction over disputes that have nothing to do with ERCOT's statutory functions described in Section 39.151. For example, a suit brought to recover damages for personal injuries sustained on ERCOT premises or a suit to enforce a janitorial services contract with ERCOT would presumably fall outside the PUC's exclusive original jurisdiction because they presumably do not implicate section 39.151's pervasive regulatory scheme.

But claims such as HWY 3's, which derive entirely from ERCOT's performance of its statutory market functions, are inextricably intertwined with this pervasive regulatory scheme and clearly fall within the scope of the PUC's regulatory authority. There is simply no reasonable ground for narrowly reading 39.151(d-4)(6)—which affirmatively grants PUC review authority—to suggest that the PUC lacks jurisdiction over claims that fall within the scope of section 39.151's regulatory framework.

Moreover, whatever the nature of the discretion intended by the use of "may" here, that discretion indisputably lies with the PUC—not with the party filing a dispute. For this reason, section 39.151(d-4)(6) cannot be read to create a choice of venues for plaintiffs.

[72] *See* TEX. GOV'T CODE § 311.016(1) ("'may' creates discretionary authority or grants permission or a power.").

4. HWY 3's styling of its claim as a common-law breach of contract suit for damages and attorneys' fees does not affect the PUC's exclusive original jurisdiction to review ERCOT's application of the Protocols.

a. The Standard Form Agreement is part of the ERCOT Protocols and has an "administrative character" that justifies PUC consideration of disputes involving that agreement.

HWY 3 reasons that because some of its claims arise under the ERCOT Standard Form Agreement, the PUC lacks exclusive original jurisdiction to decide its claims because agencies cannot decide issues of contract. But HWY 3 cannot hide behind the general rule that agencies may not resolve private breach of contract claims because the Supreme Court and this Court have held that this principle does not apply where the agreement at issue has taken on an administrative character as part of the scheme of regulation. *See In re Entergy*, 142 S.W.3d at 321; *AEP Texas N. Co.*, 297 S.W.3d at 446; *Public Util. Comm'n v. Sw. Bell Tel. Co.*, 960 S.W.2d 116, 119–120 (Tex. App.—Austin 1997, no pet.).

The Standard Form Agreement is not a mere private contract whose terms reflect the bargaining of the affected parties but is instead a standard-form, non-negotiable agreement that is a part of the ERCOT Protocols—namely, Section 22, Attachment L.[73] Like other parts of the Protocols, the Standard Form Agreement embodies the intent of the PUC and ERCOT—not the intent of the parties to the

[73] *See* CR190-204, Standard Form Agreement; attached at Appendix Tab H.

agreement. Indeed, the Standard Form Agreement was part of the original version of the Protocols adopted by the PUC in 2001, and while the agreement has since been amended by the ERCOT Board of Directors, each of the provisions of the agreement on which HWY 3's counterclaims rely existed in identical form in the original PUC-approved version of the Protocols.[74] Each market participant must take the terms of the Standard Form Agreement as they exist, and if ERCOT (or the PUC) revises the agreement, the market participant must re-execute the new agreement as a condition for its continued participation in the ERCOT market.[75]

Although its primary purpose is to formally bind a market participant to following the Protocols, the Standard Form Agreement also includes important procedural requirements and remedial limitations that reflect the broader public policy import of the Agreement. Many of these provisions bear directly on HWY 3's claims. For example, in order to limit the public's exposure to market participants' default risk, the agreement requires that a market participant cure any failure to tender payment within two days.[76] The agreement also limits a party's remedies in the event of an ERCOT breach:

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[74] *See* June 2001 Protocols, available at: http://www.ercot.com/mktrules/protocols/library/2001. Even if the terms at issue had not been expressly approved by the PUC, they would still be part of the ERCOT Protocols and subject to the PUC's exclusive jurisdiction as part of the regulatory framework.

[75] *See* Protocols § 16.1 (ERCOT shall require all Market Participants (MPs) to . . . execute *the* Standard Form Market Participant Agreement . . . .") (emphasis added).

[76] CR195, Standard Form Agreement at 8.A.(1).

> (a) Unless otherwise specified in this Agreement or in the ERCOT Protocols, and subject to the provisions of Section 12, Dispute Resolution of this Agreement, in the event of a Default by ERCOT, Participant's remedies shall be limited to:
>
> (i) Immediate termination of this Agreement upon written notice to ERCOT,
>
> (ii) Monetary recovery in accordance with the Settlement procedures set forth in the ERCOT Protocols, or
>
> (iii) Specific performance.[77]

Significantly, the Standard Form Agreement also conspicuously forecloses the recovery of consequential damages:

> NEITHER PARTY IS LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY THAT MAY OCCUR, IN WHOLE OR IN PART, AS A RESULT OF A DEFAULT UNDER THIS AGREEMENT, A TORT, OR ANY OTHER CAUSE, WHETHER OR NOT A PARTY HAD KNOWLEDGE OF THE CIRCUMSTANCES THAT RESULTED IN THE SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY, OR COULD HAVE FORESEEN THAT SUCH DAMAGES OR INJURY WOULD OCCUR.[78]

Finally, the agreement also requires each party to bear its own attorney's fees:

> In the event of a dispute, including a dispute regarding a Default, under this agreement, each Party shall bear its own costs and fees, including , but not limited, to attorney's fees, court costs, and its share of any mediation or arbitration fees.[79]

[77] CR197, Standard Form Agreement at 8.B.(2)(a).
[78] CR198, Standard Form Agreement at 9.A.
[79] CR199, Standard Form Agreement at 10, para. 10.B.

These important limitations demonstrate not only that HWY 3's claims for damages and attorney's fees are foreclosed on the merits because they seek remedies beyond those permitted in the Standard Form Agreement, but for the purposes of the present jurisdictional analysis, these limitations also demonstrate that the Standard Form Agreement is an inextricable component of the relevant regulatory framework because it embodies the PUC's determination as to the appropriate remedies in the event of an ERCOT breach of its obligations. And because the agreement is a component of the PUC's implementation of the pervasive regulatory scheme of oversight over ERCOT, any controversy surrounding its interpretation should be considered in the first instance by the PUC.

This conclusion is consistent with previous court decisions finding exclusive PUC jurisdiction to construe agreements that have assumed an administrative character—notwithstanding that the actions may have been explicitly couched as breach of contract claims. In the Supreme Court's *Entergy* decision, plaintiff ratepayers had brought a breach of contract action against Entergy, an electric utility, to enforce the terms of an agreement to share savings related to a merger affecting the utility. *In re Entergy*, 142 S.W.3d at 321. The agreement at issue had previously been adopted by the PUC in a final order in a proceeding to review the merger. *Id.* at 319. As with the claims asserted by HWY 3 in this case, the *Entergy* plaintiffs argued that the PUC lacked authority to decide a contract claim.

Id. at 323. But the Supreme Court nonetheless held that the PUC had exclusive jurisdiction of the dispute because "while the Merger Agreement may have begun as a private contract, it took on an administrative character when the parties agreed that the merger savings would be implemented 'in post-merger Gulf States rate proceedings' filed with the PUC and requested that their agreement be placed in the PUC order resolving [the merger docket]." *Id.* at 323-34.

The *Entergy* court cited with approval the decision of this Court in *Public Utility Commission of Texas v. Southwestern Bell Telephone Co.* In that case, Southwestern Bell had sued to invalidate a PUC order construing a settlement agreement on attorney's fees from an earlier rate case at the PUC. *Sw. Bell Tel. Co.*, 960 S.W.2d at 119. This Court held that the trial court had no jurisdiction over the suit because the contract fell within the jurisdiction of the PUC. *Id.* at 119-120. In rejecting Southwestern Bell's argument that agencies have no authority to decide contract disputes, the Court noted that "the attorneys' fee agreement was more than a private agreement. It affected directly the public interest. The Commission's acceptance of the agreement . . . was necessary to give the agreement the administrative effect requested by the litigants." *Id.* at 122-23.

This Court reached a similar conclusion in *AEP Texas North Co. v. Public Utilities Commission*. In that case, the Court considered whether the PUC had incorrectly construed the terms of a settlement agreement between parties to an

earlier merger-approval proceeding. *AEP Texas N. Co.*, 297 S.W.3d at 444-46. That agreement required AEP Texas North Company, an electric utility, to share its margins from off-system sales with its customers through credits in annual fuel reconciliation proceedings from 1999 to 2004. *Id.* However, when the Legislature enacted SB7 in 1999, it provided for only one final fuel reconciliation proceeding, raising a question as to whether AEP would still be obligated to issue the merger savings credits after its final proceeding, and if so, how this could be done. *Id.* at 444-45.

The Court affirmed the PUC's decision to estimate AEP's future off-system sales margins and to credit those savings to ratepayers in the final fuel reconciliation, notwithstanding that this remedy was clearly not contemplated in the agreement (which was known as the "ISA"). *Id.* at 446. Citing to *Entergy*, the Court reasoned that:

> The ISA was more than a private agreement because it directly affected the public interest. . . . The Commission's acceptance of the ISA was necessary to give the agreement the administrative effect required by the litigants. The very administrative character that gave the ISA effect also gave the Commission *the authority to adjudicate disputes arising from that agreement and to fashion an administrative remedy that reasonably accomplished the intended objectives of the Commission's order*.

Id. at 446 (emphasis added; internal citations omitted). Furthermore, the Court ultimately determined that, because of the administrative nature of the ISA, the

PUC's construction of the agreement in fact presented no genuine issue of contract law at all:

> [W]e hold that the rules of contract interpretation do not apply in construing the ISA and that, while the ISA may have begun as a private contract, it assumed the character of an administrative order when it became the basis for the Commission's approval of the merger between AEP and CSW.

Id. at 447.

Like the agreements at issue in *Entergy*, *Southwestern Bell*, and *AEP Texas North*, the Standard Form Agreement has assumed an administrative character because it is an integral part of the PUC's policy framework governing the administration of the ERCOT market. Although HWY 3's claims are presented as common-law claims for breach of contract, they are, in substance, claims falling within the framework of the PUC's oversight of ERCOT's statutory functions and are therefore subject to that agency's exclusive jurisdiction.

HWY 3's argument that its common-law contract claim cannot be heard by the PUC ignores that the only reason there is any contract at issue in the first place is that PURA authorizes the PUC (and, by extension, ERCOT) to develop market rules, which include the Standard Form Agreement. TEX. UTIL. CODE § 39.151(d). To the extent the PUC and ERCOT chose to devise a form contract to create procedures and remedial limitations as part of this rule framework, any dispute

arising out of that form contract should be resolved in the same manner as any other dispute arising under this regulatory scheme—by the PUC.

HWY 3 cites several PUC and court decisions recognizing the general rule that agencies lack authority to resolve private contract disputes.[80] However, these cases are distinguishable for the simple reason that they involved privately negotiated contracts that had *not* assumed an administrative character like the contracts at issue in *Entergy*, *Southwestern Bell*, *AEP Texas North*, and in this case.

Among the authorities cited by HWY 3 is a PUC order concluding that the agency lacked jurisdiction to resolve a dispute concerning a private mediation settlement agreement between ERCOT and a market participant.[81] But HWY 3 fails to note that this decision predated the 2005 amendments to section 39.151 of PURA which gave the PUC explicit authority to "resolve disputes between an affected person and an independent organization . . ." and refashioned section 39.151(d) to provide the PUC "complete authority" over ERCOT's operations.[82] Although this decision is distinguishable for reasons already mentioned, it is quite likely that this decision would be different today in light of these amendments. In fact, the PUC submitted an amicus brief in the trial court in this case explicitly

[80] Brief of Appellant HWY 3 MHP, LLC at 16-17.
[81] Brief of Appellant HWY 3 MHP, LLC at 17-18, citing Tex. Pub. Util. Comm'n, *Petition of the Electric Reliability Council of Texas for Declaratory Order Interpreting ERCOT Protocols*, Docket No. 27538 (May 19, 2004).
[82] *See* TEX. UTIL. CODE §§ 39.151(d), (d-4)(6); amended by Acts 2005, 79th Leg., R.S., ch. 797 (SB 408), § 9.

stating that it has "exclusive original jurisdiction over complaints that ERCOT improperly applied the Protocols."[83] The PUC's amicus brief is dispositive of the agency's position on the issue.

HWY 3 also argues that an agency's approval of a form contract does not make the contract "part of the agenc[y's] rules" or give the agency exclusive jurisdiction over disputes arising from the contract. But this misstates ERCOT's argument. ERCOT does not contend that the Standard Form Agreement falls within the PUC's exclusive jurisdiction merely because it was promulgated by the PUC, or by ERCOT pursuant to delegated authority; rather, the agreement falls within the PUC's exclusive jurisdiction because it is part of a pervasive regulatory scheme under the PUC's control. Additionally, this Court decided in *Constellation* that the ERCOT Protocols *are themselves* administrative rules, and that deference to the PUC's interpretation of ERCOT Protocols is critical for the very reason that "an agency's interpretation of a rule *becomes part of the rule itself. . . .*" *Constellation*, 351 S.W.3d at 595 (citing *H.G. Sledge, Inc. v. Prospective Inv. & Trading Co.*, 36 S.W.3d 597, 604 (Tex. App.—Austin 2000, pet. denied)).

Without citing any case in support, HWY 3 also posits that the prevalence of insurance coverage disputes based on standard property policy forms adopted by the Texas Department of Insurance (TDI) demonstrates that agencies do not have

[83] CR402, Brief of Amicus Curiae Public Utility Commission of Texas at 9.

exclusive jurisdiction over disputes concerning an interpretation of those forms.[84] But in fact, this Court has previously determined that the TDI *should* have the initial say in a suit seeking to construe the terms of a standard TDI insurance policy form. *See Beacon Nat. Ins. Co. v. Montemayor*, 86 S.W.3d 260, 264 (Tex. App.—Austin 2002, no pet.). Although the Court in *Beacon* couched its decision in terms of primary jurisdiction, the Court ultimately sustained TDI's plea to the jurisdiction and dismissed the suit based on its determination that the plaintiff failed to exhaust its administrative remedies. *Id.* at 264. This relief is consistent with a determination that the agency had exclusive original jurisdiction. *See Apollo Enters., Inc. v. ScripNet, Inc.*, 301 S.W.3d 848, 871 (Tex. App.—Austin 2009, no pet.) (noting that primary jurisdiction does not divest the trial court of its subject matter jurisdiction).

b. HWY 3's claims for consequential damages and attorney's fees do not foreclose the PUC's exclusive original jurisdiction over the allegations asserted in HWY 3's counterclaims.

HWY 3 further argues that the PUC cannot have jurisdiction over its complaint because the PUC cannot award it money damages. But this argument ignores that remedies may be limited as part of a regulatory scheme,[85] and the mere

[84] Brief of Appellant HWY 3 MHP, LLC at 19-20.

[85] *See,e.g.*, *Texas Mutual Insurance Co. v. Ruttiger*, 381 S.W.3d 430, 445-46 (Tex. 2012) (holding that procedural and remedial scheme in Workers' Compensation Act demonstrates legislative intent to preclude suits for unfair and deceptive practices under Insurance Code or Deceptive Trade Practices Act); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 815 (Tex.

assertion of an entitlement to a particular form of relief is not sufficient to invade an agency's regulatory sphere and supplant its lawfully established procedures and remedies.

In this case, the Standard Form Agreement explicitly precludes recovery of consequential damages and attorney's fees.[86] Allowing HWY 3 to proceed to trial on these claims would plainly circumvent the remedial limitations adopted by the PUC pursuant to its express rulemaking authority under section 39.151. In *American Motorists v. Fodge*, the Supreme Court held that a trial court was without jurisdiction to award plaintiff damages for wrongful deprivation of workers compensation benefits because to do so necessarily impinged on the authority of the Workers' Compensation Commission's administration of the workers compensation scheme:

> Allowing courts to award damages for wrongful deprivation of benefits would circumvent the Commission's jurisdiction and therefore could not be permitted. Thus, just as a court cannot award compensation benefits, except on appeal from a Commission ruling, neither can it award damages for a denial in payment of compensation benefits without a determination by the Commission that such benefits were due.

Am. Motorists Ins. Co. v. Fodge, 63 S.W.3d 801, 804 (Tex. 2001). Similarly, allowing HWY 3 to proceed to jury trial on a claim for consequential damages

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2010) (holding that Texas Commission on Human Rights Act provides exclusive remedy for sexual harassment claims, thus prohibiting common-law suits for negligence).

[86] CR 20-21, Standard Form Agreement at 9.A, 10.B.

would necessarily violate the limitations on recovery adopted by the PUC within the scope of its delegated authority.

Moreover, with regard to HWY 3's request for attorney's fees, the Supreme Court has determined that such a request alone does not confer jurisdiction on the trial court when the agency has exclusive jurisdiction over the subject matter in dispute, notwithstanding the unavailability of that relief at the PUC. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 626 (Tex. 2007) ("[P]laintiffs' request for core-claim attorney's fees . . . cannot operate to vest the trial court with jurisdiction where there was none before.").

Money damages would be unnecessary if HWY 3 had timely availed itself of the PUC's complaint process under Rule 22.251. Under that rule, the PUC could have provided any appropriate relief—including temporary relief[87]—to prevent any harm from occurring in the first place. Specifically, HWY 3 could have requested that the PUC suspend the mass-transitioning of its customers to another REP, or could have requested that the PUC order ERCOT to return those customer accounts, thus precluding the loss of its business for which it now seeks damages. But HWY 3 never availed itself of these administrative remedies. HWY 3's failure to take timely action to mitigate the harms it now alleges cannot vest the Court with jurisdiction to hear its claim.

[87] Rule 22.251 authorizes the PUC to "suspend the conduct or the implementation of the decision complained of while the complaint is pending . . . ." 16 TEX. ADMIN. CODE § 22.251(d)(2).

5. The Standard Form Agreement's venue provision does not affect the Public Utility Commission's exclusive original jurisdiction over this matter.

The Standard Form Agreement's venue provision—requiring any suit to be filed in Travis County state or federal court[88]—is irrelevant to the issue of jurisdiction because it governs only venue. The relevant part of the provision reads as follows:

> Neither Party waives primary jurisdiction as a defense; provided that any court suits regarding this Agreement shall be brought in a state or federal court located within Travis County, Texas, and the Parties hereby waive any defense of forum non-conveniens, except defenses under Tex. Civ. Prac. & Rem. Code § 15.002(b).[89]

Contrary to HWY 3's assumption, the mere existence of the venue provision does not suggest an implicit understanding by the parties (or by the PUC) that a court must have jurisdiction over any complaint arising out of the Protocols. Rather, the provision simply requires that, for those complaints over which the courts *do* have jurisdiction (such as ERCOT's suit), venue in Travis County is mandatory. HWY 3's strained construction of the provision ignores that jurisdiction cannot be conferred by agreement[90] and also fails to acknowledge that the provision expressly reserves the availability of a primary jurisdiction defense,

[88] *See* CR100, Standard Form Agreement at 10, § 11.A.
[89] *Id.*
[90] *See GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 866 (Tex. App.—Austin 2008, no pet.).

which reflects an expectation that the PUC should have the initial authority to decide certain issues requiring its expertise.[91]

6. The fact that the trial court has jurisdiction over ERCOT's suit does not require a determination that the PUC lacks exclusive original jurisdiction over HWY 3's claims.

HWY 3 suggests that, by bringing suit for breach of contract, ERCOT has admitted that the Court has jurisdiction over HWY 3's claims. ERCOT disagrees. HWY 3's counterclaims challenge ERCOT's interpretation and application of the Protocols and therefore raise a dispute within the PUC's jurisdiction under section 39.151 of PURA. By contrast, ERCOT's suit simply seeks to recover liquidated sums HWY 3 owes for the energy its customers used. Until it filed its sworn denial in response to ERCOT's suit, HWY 3 had never disputed the validity of ERCOT's claim. HWY 3 could have disputed these invoices by filing a settlement and billing dispute of these claims at ERCOT,[92] or by seeking relief from the PUC under Rule 22.251. But HWY 3 never did so.

When an ERCOT market participant does not dispute an invoice, it is axiomatic that the invoice must be presumed to be valid—at least until it is

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[91] *See* CR100, *Standard Form Agreement* at 10, § 11.A. ("*Neither Party waives primary jurisdiction as a defense*, provided that any court suits regarding this Agreement shall be brought in a state or federal court located within Travis County, Texas . . . ."). Because primary jurisdiction is considered a "prudential" doctrine, not a jurisdictional one, there are valid reasons that the PUC may have included this express reservation of the availability of primary jurisdiction as a defense, while there could have been no similar utility to expressly permitting the assertion of exclusive jurisdiction.

[92] *See* Protocols § 9.5 (describing settlement and billing dispute process).

eventually disputed in court. *Cf. Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986) (agency actions "carr[y] a presumption of validity"). Without this presumption, ERCOT would have no authority to collect payments from its participants. The ability to collect payment is an essential requirement for any market.

Well after the time had passed for HWY 3 to dispute its obligation to pay this sum, ERCOT filed suit to obtain a judgment allowing it to collect that sum. ERCOT cannot initiate collection on an amount owed without a court judgment affirming its right to collect that amount. And ERCOT cannot request such an order from the PUC prior to filing suit because there would be no purpose in obtaining the PUC's confirmation of the sum owing in the absence of any dispute, and without a bona fide dispute of the sum, any order declaring ERCOT's right would amount to an unlawful advisory opinion. Moreover, even if the PUC were to issue such an advisory opinion in favor of ERCOT, ERCOT would still need to invoke the jurisdiction of the trial court in order to obtain a judgment on the sum owed. Clearly, the PUC cannot have exclusive original jurisdiction over a suit which seeks to reduce a liquidated sum to a money judgment for the purpose of collection.

Furthermore, unlike HWY 3's counterclaims, ERCOT's claims do not disrupt the remedial framework established in PURA and in the Protocols; rather ERCOT's suit is filed expressly *in furtherance* of this scheme, as the only way to

collect the sums that are owed and previously undisputed is to file suit. If ERCOT did not file suit, all consumers in ERCOT would be unjustly forced to bear the cost of the debt—just as they have thus far in this litigation.

ERCOT acknowledges that when a dispute arises as to the validity of any debt claimed in a suit on sworn account, that dispute will likely raise an issue for the PUC to decide within its exclusive jurisdiction. However, HWY 3's sworn denial does not specify the precise grounds on which the account is disputed, and HWY 3's pleadings will need to be clarified before it can be determined whether there is any bona fide dispute that should be considered by the PUC. [93] Upon such clarification, the trial court may well determine that HWY 3 has waived these defenses because it failed to timely bring them to the PUC or ERCOT.

If the trial court does ultimately decide that such a dispute exists, and that any proper defense has not already been waived, the trial court should instead abate the proceeding pending PUC resolution of the disputed issues because only the court has the authority to grant the remedy to which ERCOT is entitled under the regulatory framework.[94]

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[93] HWY 3's Original Answer to ERCOT's suit only generally denies ERCOT's claims and provides only boilerplate defenses such as failure of conditions precedent, failure to mitigate damages, and waiver and estoppel. C.R. at 77-78.

[94] *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 228 (Tex. 2002) (If defect in jurisdiction is curable, a "court may abate proceedings to allow a reasonable opportunity for the jurisdictional problem to be cured.").

C. If the Court determines that it has jurisdiction over this appeal because ERCOT is a governmental unit under the Tort Claims Act, then the dismissal of Appellant's counterclaims was appropriate for the additional reason that ERCOT is immune from suit.

HWY 3 claims interlocutory appellate jurisdiction under section 51.014(a)(8) of the Civil Practice and Remedies Code, which authorizes review of a trial court's order that "grants or denies a plea to the jurisdiction by a governmental unit *as that term is defined in Section 101.001*." Section 101.001 of the Civil Practice and Remedies Code is part of the Tort Claims Act. As already noted, the Supreme Court has recognized that the purpose of interlocutory review under section 51.014(a)(8) is to "resolv[e] the question of *sovereign immunity* prior to suit rather than after a full trial on the merits. . . ." *Koseoglu*, 233 S.W.3d at 845. Given this legislative aim, it follows that the Legislature must have understood that any entity that qualifies as a "governmental unit" would presumably be entitled to assert immunity from suit.

This conclusion is supported by a review of the Texas Tort Claims Act. The purpose of the Tort Claims Act is to establish a limited waiver of sovereign immunity. *See Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (recognizing that "basic purpose" of Tort Claims Act is "waiving immunity only to a limited degree."). The core provisions of the Tort Claims Act are section 101.021, which states that "[a] *governmental unit* in

the state is liable for" various classes of injuries, and section 101.025, which allows a person to "sue a *governmental unit* for damages allowed by this chapter." *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, .025(b) (emphasis added). Thus, it is apparent that the Legislature's purpose in defining "governmental unit" in section 101.001(3) was to create a term that would conceptually include all entities entitled to assert immunity from suit at common law so that the waiver of immunity in sections 101.021 and 101.025 would be effective for all such entities.

Any assertion that the Legislature meant to include within the scope of the term "governmental unit" additional entities beyond those that were understood to be entitled to assert immunity is unsupported by the language of the Tort Claims Act, as all references to "governmental unit" in the Act either support, or follow from, the broader legislative purpose of a limited waiver.

Accordingly, when an entity is deemed to be a "governmental unit" as defined in the Tort Claims Act, it should be understood to be among the class of entities entitled to assert immunity from suit. *See, e.g., Christus Spohn Health Sys. Corp. v. Ven Huizen*, No. 13-10-400-CV, 2011 WL 1900174 (Tex. App.—Corpus Christi May 19, 2011, pet. denied) (holding that hospital district management contractor was entitled to assert immunity from suit because it is considered a governmental unit for Tort Claims Act purposes).

Concluding that ERCOT is a governmental unit for purposes of establishing jurisdiction over an interlocutory appeal but then denying ERCOT the corresponding immunity its acknowledged governmental status should bestow would be inconsistent and unfair. Either ERCOT is a governmental unit for all purposes under the Tort Claims Act, or it is not a governmental unit for any purpose under the Act. ERCOT maintains that it is not a governmental unit, but if it is, it should be entitled to assert sovereign immunity from suit in this and all other cases where such immunity may otherwise be validly asserted.

If this Court determines that it has jurisdiction over this appeal because ERCOT is a governmental unit, then the trial court lacked jurisdiction over HWY 3's counterclaims for the additional reason that ERCOT is entitled to immunity from suit. Immunity from suit deprives a trial court of jurisdiction to hear claims against the governmental entity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003).

D. The trial court properly dismissed HWY 3's claims with prejudice to refiling.

Although PUC Rule 22.251 establishes a process for appealing ERCOT decisions, HWY 3 can no longer avail itself of this process because it must be commenced "within 35 days of the ERCOT conduct complained of" or within 35

days of the date the ERCOT-level dispute resolution process was completed.[95] Indeed, HWY 3 waived its right to seek relief at the PUC in the first instance by failing to file a dispute with ERCOT, as required by Section 10.A. of the Standard Form Agreement and Section 22.251 of the PUC's Procedural Rules.[96]

HWY 3's failure to timely file a dispute with the PUC is an incurable jurisdictional defect, requiring the dismissal of its claims with prejudice. *See Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) (concluding that, where time for submitting claims subject to agency's exclusive jurisdiction had lapsed, such claims "would no longer be viable and should be dismissed."); *Apollo Enterprises, Inc. v. ScripNet, Inc.*, 301 S.W.3d 848, 867 (Tex. App.—Austin 2009, no pet.) (holding that failure to submit medical fee dispute before agency-imposed deadline was incurable jurisdictional defect requiring dismissal of dispute).

IX. Conclusion and Prayer

HWY 3 has improperly attempted to invoke this Court's jurisdiction. The Court has no jurisdiction over this appeal because ERCOT is not a governmental unit as defined in the Tort Claims Act and because this appeal would not serve the recognized purpose of interlocutory appellate review. If the Court accepts jurisdiction over this appeal, however, it should affirm the trial court's dismissal of

[95] *See* PUC Proc. R. 22.251(d) (16 TEX. ADMIN. CODE § 22.251(d)).
[96] *See id.* ("An entity must use Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures, or ADR), or Section 21 of the Protocols (Process for Protocol Revision), or other Applicable ERCOT Procedures, before presenting a complaint to the commission.")

HWY 3's counterclaims because PURA unequivocally creates a pervasive regulatory scheme requiring the PUC's exclusive original jurisdiction of all disputes concerning the ERCOT Protocols. Alternatively, the Court should affirm the trial court's order on the basis that the claims were properly dismissed because ERCOT, as a governmental unit, is entitled to sovereign immunity from suit.

For the foregoing reasons, ERCOT requests that the Court dismiss this appeal, or alternatively, that it affirm the order of the trial court dismissing HWY 3's counterclaims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because the word court reported by Microsoft Word states that this brief contains 14,683 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it uses Times New Roman 14-point font for the text of the body and Times New Roman 12-point font in the text of the footnotes.

/s/ J. Hampton Skelton
J. Hampton Skelton

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2014, a true and correct copy of the foregoing document was electronically filed using a certified Electronic Filing Service Provider, which will send electronic notification of such filing to counsel of record, and via email to:

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APPENDIX

A. PURA § 39.151

Vernon's Texas Statutes and Codes Annotated
Utilities Code (Refs & Annos)
Title 2. Public Utility Regulatory Act
Subtitle B. Electric Utilities (Refs & Annos)
Chapter 39. Restructuring of Electric Utility Industry
Subchapter D. Market Structure

V.T.C.A., Utilities Code § 39.151

§ 39.151. Essential Organizations

Effective: September 1, 2013
Currentness

(a) A power region must establish one or more independent organizations to perform the following functions:

(1) ensure access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms;

(2) ensure the reliability and adequacy of the regional electrical network;

(3) ensure that information relating to a customer's choice of retail electric provider is conveyed in a timely manner to the persons who need that information; and

(4) ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region.

(b) “Independent organization” means an independent system operator or other person that is sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller.

(c) The commission shall certify an independent organization or organizations to perform the functions prescribed by this section. The commission shall apply the provisions of this section and Sections 39.1511, 39.1512, and 39.1515 so as to avoid conflict with a ruling of a federal regulatory body.

(d) The commission shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules. Any such rules adopted by an independent organization and any enforcement actions taken by the organization are subject to commission oversight and review. An independent organization certified by the commission is directly responsible and accountable to the commission. The commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties. The organization shall fully cooperate with the commission in the commission's oversight and investigatory functions. The commission may take appropriate action against an organization that does not adequately perform the organization's functions or

duties or does not comply with this section, including decertifying the organization or assessing an administrative penalty against the organization. The commission by rule shall adopt procedures governing decertification of an independent organization, selecting and certifying a successor organization, and transferring assets to the successor organization to ensure continuity of operations in the region. The commission may not implement, by order or by rule, a requirement that is contrary to an applicable federal law or rule.

(d-1) The commission shall require an independent organization certified by the commission under this section to submit to the commission the organization's entire proposed annual budget. The commission shall review the proposed budgets either annually or biennially and may approve, disapprove, or modify any item included in a proposed budget. The commission by rule shall establish the type of information or documents needed to effectively evaluate the proposed budget and reasonable dates for the submission of that information or those documents. The commission shall establish a procedure to provide public notice of and public participation in the budget review process.

(d-2) Except as otherwise agreed to by the commission and an independent organization certified by the commission under this section, the organization must submit to the commission for review and approval proposals for obtaining debt financing or for refinancing existing debt. The commission may approve, disapprove, or modify a proposal.

(d-3) An independent organization certified by the commission under this section shall develop proposed performance measures to track the organization's operations. The independent organization must submit the proposed performance measures to the commission for review and approval. The commission shall review the organization's performance as part of the budget review process under Subsection (d-1). The commission shall prepare a report at the time the commission approves the organization's budget detailing the organization's performance and submit the report to the lieutenant governor, the speaker of the house of representatives, and each house and senate standing committee that has jurisdiction over electric utility issues.

(d-4) The commission may:

(1) require an independent organization to provide reports and information relating to the independent organization's performance of the functions prescribed by this section and relating to the organization's revenues, expenses, and other financial matters;

(2) prescribe a system of accounts for an independent organization;

(3) conduct audits of an independent organization's performance of the functions prescribed by this section or relating to its revenues, expenses, and other financial matters and may require an independent organization to conduct such an audit;

(4) inspect an independent organization's facilities, records, and accounts during reasonable hours and after reasonable notice to the independent organization;

(5) assess administrative penalties against an independent organization that violates this title or a rule or order adopted by the commission and, at the request of the commission, the attorney general may apply for a court order to require an independent organization to comply with commission rules and orders in the manner provided by Chapter 15; and

(6) resolve disputes between an affected person and an independent organization and adopt procedures for the efficient resolution of such disputes.

(e) After approving the budget of an independent organization under Subsection (d-1), the commission shall authorize the organization to charge to wholesale buyers and sellers a system administration fee, within a range determined by the commission, that is reasonable and competitively neutral to fund the independent organization's approved budget . The commission shall investigate the organization's cost efficiencies, salaries and benefits, and use of debt financing and may require the organization to provide any information needed to effectively evaluate the reasonableness and neutrality of the fee or to evaluate the effectiveness or efficiency of the organization. The commission shall work with the organization to establish the detail of information, both current and historical, and the time frames the commission needs to effectively evaluate the fee. The commission shall require the organization to closely match actual revenues generated by the fee and other sources of revenue with revenue necessary to fund the budget, taking into account the effect of a fee change on market participants and consumers, to ensure that the budget year does not end with surplus or insufficient funds. The commission shall require the organization to submit to the commission, on a schedule determined by the commission, reports that compare actual expenditures with budgeted expenditures .

(e-1) The review and approval of a proposed budget under Subsection (d-1) or a proceeding to authorize and set the range for the amount of a fee under Subsection (e) is not a contested case for purposes of Chapter 2001, Government Code.

(f) In implementing this section, the commission may cooperate with the utility regulatory commission of another state or the federal government and may hold a joint hearing or make a joint investigation with that commission.

(g) To maintain certification as an independent organization under this section, an organization's governing body must be composed of persons specified by this section and selected in accordance with formal bylaws or protocols of the organization. The bylaws or protocols must be approved by the commission and must reflect the input of the commission. The bylaws must specify the process by which appropriate stakeholders elect members and, for unaffiliated members, prescribe professional qualifications for selection as a member. The bylaws must require the use of a professional search firm to identify candidates for membership of unaffiliated members. The process must allow for commission input in identifying candidates. The governing body must be composed of:

(1) the chairman of the commission as an ex officio nonvoting member;

(2) the counsellor as an ex officio voting member representing residential and small commercial consumer interests;

(3) the chief executive officer of the independent organization as an ex officio voting member;

(4) six market participants elected by their respective market segments to serve one-year terms, with:

(A) one representing independent generators;

(B) one representing investor-owned utilities;

(C) one representing power marketers;

(D) one representing retail electric providers;

(E) one representing municipally owned utilities; and

(F) one representing electric cooperatives;

(5) one member representing industrial consumer interests and elected by the industrial consumer market segment to serve a one-year term;

(6) one member representing large commercial consumer interests selected in accordance with the bylaws to serve a one-year term; and

(7) five members unaffiliated with any market segment and selected by the other members of the governing body to serve three-year terms.

(g-1) The presiding officer of the governing body must be one of the members described by Subsection (g)(7).

(h) The ERCOT independent system operator may meet the criteria relating to the other functions of an independent organization provided by Subsection (a) by adopting procedures and acquiring resources needed to carry out those functions, consistent with any rules or orders of the commission.

(i) The commission may delegate authority to the existing independent system operator in ERCOT to enforce operating standards within the ERCOT regional electrical network and to establish and oversee transaction settlement procedures. The commission may establish the terms and conditions for the ERCOT independent system operator's authority to oversee utility dispatch functions after the introduction of customer choice.

(j) A retail electric provider, municipally owned utility, electric cooperative, power marketer, transmission and distribution utility, or power generation company shall observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the independent system operator in ERCOT. Failure to comply with this subsection may result in the revocation, suspension, or amendment of a certificate as provided by Section 39.356 or in the imposition of an administrative penalty as provided by Section 39.357.

(k) To the extent the commission has authority over an independent organization outside of ERCOT, the commission may delegate authority to the independent organization consistent with Subsection (i).

(l) No operational criteria, protocols, or other requirement established by an independent organization, including the ERCOT independent system operator, may adversely affect or impede any manufacturing or other internal process operation associated with an industrial generation facility, except to the minimum extent necessary to assure reliability of the transmission network.

(m) A power region outside of ERCOT shall be deemed to have met the requirement to establish an independent organization to perform the transmission functions specified in Subsection (a) if the Federal Energy Regulatory Commission has approved a regional transmission organization for the region and found that the regional transmission organization meets the requirements of Subsection (a).

(n) An independent organization certified by the commission under this section is subject to review under Chapter 325, Government Code (Texas Sunset Act), but is not abolished under that chapter.The independent organization shall be reviewed during the periods in which the Public Utility Commission of Texas is reviewed.

(n-1) Expired.

Credits

Added by Acts 1999, 76th Leg., ch. 405, § 39, eff. Sept. 1, 1999. Amended by Acts 2005, 79th Leg., ch. 797, § 9, eff. Sept. 1, 2005; Acts 2011, 82nd Leg., ch. 1232 (S.B. 652), § 1.09, eff. June 17, 2011; Acts 2013, 83rd Leg., ch. 170 (H.B. 1600), § 1.08, eff. Sept. 1, 2013.

Notes of Decisions (2)

V. T. C. A., Utilities Code § 39.151, TX UTIL § 39.151
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

B. PUC Procedural Rule 22.251

Subchapter M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS.

§22.251. Review of Electric Reliability Council of Texas (ERCOT) Conduct.

(a) **Purpose.** This section prescribes the procedure by which an entity, including the commission staff and the Office of Public Utility Counsel, may appeal a decision made by ERCOT or any successor in interest to ERCOT.

(b) **Scope of complaints.** Any affected entity may complain to the commission in writing, setting forth any conduct that is in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order or rule of the commission, or of any protocol or procedure adopted by ERCOT pursuant to any law that the commission has jurisdiction to administer. For the purpose of this section, the term "conduct" includes a decision or an act done or omitted to be done. The scope of permitted complaints includes ERCOT's performance as an independent organization under the PURA including, but not limited to, ERCOT's promulgation and enforcement of procedures relating to reliability, transmission access, customer registration, and accounting for the production and delivery of electricity among generators and other market participants.

(c) **Requirement of compliance with ERCOT Protocols.** An entity must use Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures, or ADR), or Section 21 of the Protocols (Process for Protocol Revision), or other Applicable ERCOT Procedures, before presenting a complaint to the commission. For the purpose of this section, the term "Applicable ERCOT Procedures" refers to Sections 20 and 21 of the ERCOT Protocols and other applicable sections of the ERCOT protocols that are available to challenge or modify ERCOT conduct, including participation in the protocol revision process. If a complainant fails to use the Applicable ERCOT Procedures, the presiding official may dismiss the complaint or abate it to give the complainant an opportunity to use the Applicable ERCOT Procedures.

(1) A complainant may present a formal complaint to the commission, without first using the Applicable ERCOT Procedures, if:

(A) the complainant is the commission staff or the Office of Public Utility Counsel;

(B) the complainant is not required to comply with the Applicable ERCOT Procedures; or

(C) the complainant seeks emergency relief necessary to resolve health or safety issues or where compliance with the Applicable ERCOT Procedures would inhibit the ability of the affected entity to provide continuous and adequate service.

(2) For any complaint that is not addressed by paragraph (1) of this subsection, the complainant may submit to the commission a written request for waiver of the requirement for using the Applicable ERCOT Procedures. The complainant shall clearly state the reasons why the Applicable ERCOT Procedures are not appropriate. The commission may grant the request for good cause.

(3) For complaints for which ADR proceedings have not been conducted at ERCOT, the presiding officer may require informal dispute resolution.

(d) **Formal complaint.** A formal complaint shall be filed within 35 days of the ERCOT conduct complained of, except as otherwise provided in this subsection. When an ERCOT ADR procedure has been timely commenced, a complaint concerning the conduct or decision that is the subject of the ADR procedure shall be filed no later than 35 days after the completion of the ERCOT ADR procedure. The presiding officer may extend the deadline, upon a showing of good cause, including the parties' agreement to extend the deadline to accommodate ongoing efforts to resolve the matter informally, and the complainant's failure to timely discover through reasonable efforts the injury giving rise to the complaint.

(1) The complaint shall include the following information:

§22.251(d)(1) continued

(A) a complete list of all complainants and the entities against whom the complainant seeks relief and the addresses, and facsimile transmission numbers and e-mail addresses, if available, of the parties' counsel or other representatives;

(B) a statement of the case that ordinarily should not exceed two pages and should not discuss the facts. The statement must contain the following:

(i) a concise description of any underlying proceeding or any prior or pending related proceedings;

(ii) the identity of all entities or classes of entities who would be directly affected by the commission's decision, to the extent such entities or classes of entities can reasonably be identified;

(iii) a concise description of the conduct from which the complainant seeks relief;

(iv) a statement of the ERCOT procedures, protocols, by-laws, articles of incorporation, or law applicable to resolution of the dispute and whether the complainant has used the Applicable ERCOT Procedures for challenging or modifying the complained of ERCOT conduct or decision (as described in subsection (c) of this section) and, if not, the provision of subsection (c) of this section upon which the complainant relies to excuse its failure to use the Applicable ERCOT Procedures;

(v) a statement of whether the complainant seeks a suspension of the conduct or implementation of the decision complained of; and

(vi) a statement without argument of the basis of the commission's jurisdiction.

(C) a detailed and specific statement of all issues or points presented for commission review;

(D) a concise statement without argument of the pertinent facts. Each fact shall be supported by references to the record, if any;

(E) a clear and concise argument for the contentions made, with appropriate citation to authorities and to the record, if any;

(F) a statement of all questions of fact, if any, that the complainant contends require an evidentiary hearing;

(G) a short conclusion that states the nature of the relief sought; and

(H) a record consisting of a certified or sworn copy of any document constituting or evidencing the matter complained of. The record may also contain any other item pertinent to the issues or points presented for review, including affidavits or other evidence on which the complainant relies.

(2) If the complainant seeks to suspend the conduct or the implementation of the decision complained of while the complaint is pending and all entities against whom the complainant seeks relief do not agree to the suspension, the complaint shall include a statement of the harm that is likely to result to the complainant if enforcement is not suspended. Harm may include deprivation of an entity's ability to obtain meaningful or timely relief if a suspension is not entered. A request for suspension of the conduct or enforcement of a decision shall be reviewed in accordance with subsection (i) of this section.

(3) All factual statements in the complaint shall be verified by affidavit made on personal knowledge by an affiant who is competent to testify to the matters stated.

(4) A complainant shall file the required number of copies of the formal complaint, pursuant to §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). A complainant shall serve copies of the complaint and other documents, in accordance with §22.74 of this title (relating to Service of Pleadings and Documents), and in particular shall serve a copy of the complaint on ERCOT's General Counsel, every other entity from whom relief is sought, the Office of Public Utility Counsel, and any other party.

§22.251 continued

(e) **Notice.** Within 14 days of receipt of the complaint, ERCOT shall provide notice of the complaint by email to all qualified scheduling entities and, at ERCOT's discretion, all relevant ERCOT committees and subcommittees. Notice shall consist of an attached electronic copy of the complaint, including the docket number, but may exclude the record required by subsection (d)(1)(H) of this section.

(f) **Response to complaint.** A response to a complaint shall be due within 28 days after receipt of the complaint and shall conform to the requirements for the complaint set forth in subsection (d) of this section except that:

(1) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the complaint;

(2) the response need not include a statement of the case, a statement of the issues or points presented for commission review, or a statement of the facts, unless the respondent contests that portion of the complaint;

(3) a statement of jurisdiction should be omitted unless the complaint fails to assert valid grounds for jurisdiction, in which case the reasons why the commission lacks jurisdiction shall be concisely stated;

(4) the argument shall be confined to the issues or points raised in the complaint;

(5) the record need not include any item already contained in a record filed by another party; and

(6) if the complainant seeks a suspension of the conduct or implementation of the decision complained of, the response shall state whether the respondent opposes the suspension and, if so, the basis for the opposition, specifically stating the harm likely to result if a suspension is ordered.

(g) **Comments by commission staff and motions to intervene.** Commission staff representing the public interest shall file comments within 45 days after the date on which the complaint was filed. In addition, any party desiring to intervene pursuant to §22.103 of this title (relating to Standing to Intervene) shall file a motion to intervene within 45 days after the date on which the complaint was filed. A motion to intervene shall be accompanied by a response to the complaint.

(h) **Reply.** The complainant may file a reply addressing any matter in a party's response or commission staff's comments. A reply, if any, must be filed within 55 days after the date on which the complaint was filed. However, the commission may consider and decide the matter before a reply is filed.

(i) **Suspension of enforcement.** The ERCOT conduct complained of shall remain in effect until and unless the presiding officer or the commission issues an order suspending the conduct or decision. If the complainant seeks to suspend the conduct or implementation of the decision complained of while the complaint is pending and all entities against whom the complainant seeks relief do not agree to the suspension, the complainant must demonstrate that there is good cause for suspension. The good cause determination required by this subsection shall be based on an assessment of the harm that is likely to result to the complainant if a suspension is not ordered, the harm that is likely to result to others if a suspension is ordered, the likelihood of the complainant's success on the merits of the complaint, and any other relevant factors as determined by the commission or the presiding officer.

(1) The presiding officer may issue an order, for good cause, on such terms as may be reasonable to preserve the rights and protect the interests of the parties during the processing of the complaint, including requiring the complainant to provide reasonable security, assurances, or to take certain actions, as a condition for granting the requested suspension.

(2) A party may appeal a decision of a presiding officer granting or denying a request for a suspension, pursuant to §22.123 of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Orders Issued by the Commission).

§22.251 continued

(j) **Oral argument.** If the facts are such that the commission may decide the matter without an evidentiary hearing on the merits, a party desiring oral argument shall comply with the procedures set forth in §22.262(d) of this title (relating to Commission Action After a Proposal for Decision). In its discretion, the commission may decide a case without oral argument if the argument would not significantly aid the commission in determining the legal and factual issues presented in the complaint.

(k) **Extension or shortening of time limits.** The time limits established by this section are intended to facilitate the expeditious resolution of complaints brought pursuant to this section.

(1) The presiding officer may grant a request to extend or shorten the time periods established by this rule for good cause shown. Any request or motion to extend or shorten the schedule must be filed prior to the date on which any affected filing would otherwise be due. A request to modify the schedule shall include a representation of whether all other parties agree with the request, and a proposed schedule.

(2) For cases to be determined after the making of factual determinations or through commission ADR as provided for in subsection (n) of this section, the presiding officer shall issue a procedural schedule.

(l) **Standard for review.** If the factual determinations supporting the conduct complained of have not been made in a manner that meets the procedural standards specified in this subsection, or if factual determinations necessary to the resolution of the matter have not been made, the commission will resolve any factual issues on a *de novo* basis. If the factual determinations supporting the conduct complained have been made in a manner that meets the procedural standards specified in this subsection, the commission will reverse a factual finding only if it is not supported by substantial evidence or is arbitrary and capricious. The procedural standards in this subsection require that facts be determined:

(1) In a proceeding to which the parties have voluntarily agreed to participate; and

(2) By an impartial third party under circumstances that are consistent with the guarantees of due process inherent in the procedures described in the Texas Government Code Chapter 2001 (Administrative Procedure Act).

(m) **Referral to the State Office of Administrative Hearings.** If resolution of a complaint does not require determination of any factual issues, the commission may decide the issues raised by the complaint on the basis of the complaint and the comments and responses. If factual determinations must be made to resolve a complaint brought under this section, and the parties do not agree to the making of all such determinations pursuant to a procedure described in subsection (n) of this section, the matter may be referred to the State Office of Administrative Hearings for the making of all necessary factual determinations and the preparation of a proposal for decision, including findings of fact and conclusions of law, unless the commission or a commissioner serves as the finder of facts.

(n) **Availability of alternative dispute resolution.** Pursuant to Texas Government Code Chapter 2009 (Governmental Dispute Resolution Act), the commission shall make available to the parties alternative dispute resolution procedures described by Civil Practices and Remedies Code Chapter 154, as well as combinations of those procedures. The use of these procedures before the commission for complaints brought under this section shall be by agreement of the parties only.

(o) **Granting of relief.** Where the commission finds merit in a complaint and that corrective action is required by ERCOT, the commission shall issue an order granting the relief the commission deems appropriate, including, but not limited to:

(1) Entering an order suspending the conduct or implementation of the decision complained of;

(2) Ordering that appropriate protocol revisions be developed;

§22.251(o) continued

(3) Providing guidance to ERCOT for further action, including guidance on the development and implementation of protocol revisions; and

(4) Ordering ERCOT to promptly develop protocols revisions for commission approval.

(p) **Notice of proceedings affecting ERCOT.** Within seven days of ERCOT receiving a pleading instituting a lawsuit against it concerning ERCOT's conduct as described in subsection (b) of this section, ERCOT shall notify the commission of the lawsuit by filing with the commission, in the commission project number designated by the commission for such filings, a copy of the pleading instituting the lawsuit. In addition, within seven days of receiving notice of a proceeding at the Federal Energy Regulatory Commission in which relief is sought against ERCOT, ERCOT shall notify the commission by filing with the commission, in the commission project number designated by the commission for such filings, a copy of the notice received by ERCOT.

C. *In re Entergy Corp.*

142 S.W.3d 316
Supreme Court of Texas.

In re ENTERGY CORPORATION, et al.

No. 03–0024. | Argued Nov. 12, 2003. | Decided June 25, 2004.

Synopsis

Background: Ratepayers brought action against electric utility and its shareholder to recover for breach of merger agreement by entering settlement agreement to resolve dispute created by deregulation. The District Court denied shareholder's motions for transfer, abatement, or dismissal for lack of subject matter jurisdiction. Shareholder petitioned for writ of mandamus. The Court of Appeals denied relief. Shareholder petitioned for mandamus.

[Holding:] The Supreme Court, Smith, held that the Public Utility Commission (PUC) had exclusive jurisdiction.

Writ conditionally granted.

West Headnotes (17)

[1] Mandamus
Remedy by Appeal or Writ of Error

Mandamus
Matters of discretion

Mandamus relief is appropriate only if the court clearly abused its discretion and the relator has no adequate remedy by appeal.

11 Cases that cite this headnote

[2] Mandamus
Remedy by Appeal or Writ of Error

As a general rule, mandamus does not lie to correct incidental trial court rulings when there is a remedy by appeal.

6 Cases that cite this headnote

[3] Mandamus
Remedy by Appeal or Writ of Error

The mere cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus review.

3 Cases that cite this headnote

[4] Mandamus
Signing or entry of judgment or order

In certain circumstances, incidental trial court rulings can be corrected by writ of mandamus.

1 Cases that cite this headnote

[5] Mandamus
Entertaining and proceeding with cause

Trial court ruling that it had jurisdiction over suit by electric utility's ratepayers alleging breach of merger agreement could be corrected by mandamus; if the Public Utility Commission (PUC) had exclusive jurisdiction, the judicial appropriation of state agency authority would be a clear disruption of the orderly processes of government, and that disruption, coupled with the hardship of forcing the utility to endure a trial, warranted an exception to the general proscription against using mandamus to correct incidental trial court rulings.

20 Cases that cite this headnote

[6] Mandamus
Nature and scope of remedy in general

The possibility that a party will be forced to endure the hardship of a full-blown trial if the Supreme Court declines to issue a writ of mandamus is, in itself, not sufficient to dictate mandamus relief.

2 Cases that cite this headnote

[7] Administrative Law and Procedure
Primary jurisdiction

An agency has exclusive jurisdiction when the legislature has granted that agency the sole

authority to make an initial determination in a dispute.

22 Cases that cite this headnote

[8] Administrative Law and Procedure
Exhaustion of administrative remedies

If an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking review of the agency's action.

15 Cases that cite this headnote

[9] Administrative Law and Procedure
Exhaustion of administrative remedies

Until the party has exhausted all administrative remedies, the trial court lacks subject matter jurisdiction and must dismiss any claim within the agency's exclusive jurisdiction.

31 Cases that cite this headnote

[10] Appeal and Error
Cases Triable in Appellate Court

The inquiry as to whether the Public Utility Commission (PUC) has exclusive jurisdiction over the dispute is a question of law reviewed de novo.

4 Cases that cite this headnote

[11] Courts
Presumptions and Burden of Proof as to Jurisdiction

Courts
Texas

Constitutional presumption exists that district courts are authorized to resolve disputes; district courts are courts of general jurisdiction and generally have subject matter jurisdiction absent a showing to the contrary. Vernon's Ann.Texas Const. Art. 5, § 8.

9 Cases that cite this headnote

[12] Administrative Law and Procedure
Statutory basis and limitation

Administrative Law and Procedure
Implied powers

Administrative agencies may exercise only those powers the law confers upon them in clear and express statutory language and those reasonably necessary to fulfill a function or perform a duty that the legislature has expressly placed with the agency.

9 Cases that cite this headnote

[13] Administrative Law and Procedure
Primary jurisdiction

An agency has exclusive jurisdiction when a pervasive regulatory scheme indicates that the legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.

18 Cases that cite this headnote

[14] Public Utilities
Constitutional and statutory provisions

In construing the Public Utility Regulatory Act (PURA) or any other statute, a court's objective is to determine and give effect to the legislature's intent. V.T.C.A., Utilities Code §§ 39.001–41.104.

1 Cases that cite this headnote

[15] Statutes
Plain Language; Plain, Ordinary, or Common Meaning

Courts look to the plain and common meaning of the statute's words.

1 Cases that cite this headnote

[16] Statutes
Plain language; plain, ordinary, common, or literal meaning

When a statute's meaning is unambiguous, courts interpret that statute according to its plain language.

3 Cases that cite this headnote

[17] Electricity

Proceedings before commissions

The Public Utility Commission (PUC) had exclusive jurisdiction over the dispute between electric utility and ratepayers who alleged breach of merger agreement by entering settlement agreement to resolve dispute created by deregulation; even if the merger agreement began as a private contract, it took on an administrative character when the parties agreed that the merger savings would be implemented in post-merger rate proceedings filed with the PUC, and services, and the merger agreement affected the public interest and was the basis for the PUC's regulatory approval of the merger. V.T.C.A., Utilities Code §§ 31.001(a), 32.001(a).

15 Cases that cite this headnote

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Opinion

Justice SMITH delivered the opinion of the Court.

This dispute arises from a private settlement agreement incorporated in a Public Utility Commission order. After the underlying lawsuit was filed, the trial court denied Entergy Corporation's [1] Motion to Transfer Venue, Motion to Dismiss for Want of Subject Matter Jurisdiction, and ***319** Motion to Abate. Entergy, having failed to secure relief from the court of appeals, now seeks a writ of mandamus from this Court on the basis that the Public Utility Commission has exclusive jurisdiction over the subject matter of this dispute. Because we agree, we conditionally grant the writ.

I. Background

In 1992, Entergy agreed to purchase Gulf States Utilities Company ("GSU"), an electric utility serving customers in eastern Texas and western Louisiana. In order to obtain the requisite regulatory approval for the transaction, Entergy and GSU filed an administrative proceeding, styled Docket No. 11292, with the Public Utility Commission of Texas ("PUC"). In 1993, Entergy, GSU, and various other parties [2] reached an agreement (the "Merger Agreement") which they filed with the PUC as a proposal for resolving Docket No. 11292. The Merger Agreement called for certain anticipated merger-related savings to be shared between ratepayers and shareholders. Nonfuel-related cost savings for the first eight years after the merger were to be divided equally between ratepayers and shareholders. After eight years, all savings were to be passed on to the ratepayers. The Merger Agreement stated that savings were to be reflected in the new entity's rates and would be implemented in three post-merger rate proceedings during the eight-year term of the agreement pursuant to either section 42 or 43 of the Public Utility Regulatory Act. [3]

The PUC adopted the Merger Agreement in its order approving the Entergy/GSU merger application. The order stated that "[a]pplicants [Entergy and GSU] SHALL comply with the terms and conditions set forth in the [Merger Agreement]" and that "GSU SHALL file PURA § 43 rate cases on the schedules and for the purposes established in [the Merger Agreement]." Entergy and GSU then completed the merger, resulting in a new entity known as Entergy Gulf States, Inc. ("EGSI"). Entergy Corporation is EGSI's sole shareholder.

EGSI filed and completed the first two rate cases contemplated by the Merger Agreement. While the second rate case was pending before the PUC, the Legislature passed Senate Bill 7, mandating retail electric deregulation in Texas. Act of May 27, 1999, 76th Leg., R.S., ch. 405, 1999 Tex. Gen. Laws 2543 (codified as Public Utility Regulatory Act (PURA), Tex. Util.Code §§ 39.001–41.104 (1998)). Senate Bill 7 dramatically altered the electric utility landscape in Texas by requiring the unbundling of generation, transmission, and distribution services. PURA § 39.051. Senate Bill 7 also froze electric utility rates through December 31, 2001 and called for retail competition to begin January 1, 2002. PURA § 39.052(a).

The passage of Senate Bill 7 raised the question of whether EGSI would be required to proceed with the third rate case contemplated by the Merger Agreement, ***320** which was scheduled to be filed in November 2001. The PUC addressed the question in Docket No. 22356, an EGSI Senate Bill 7 implementation proceeding. A June, 2000 PUC preliminary order stated:

> The Commission concludes that PURA § 39.201 is quite specific and does not contemplate an additional filing in 2001. Section 39.201(a) requires a utility to file its proposed rates for the transmission and distribution utility not later than April 1, 2001. Subsection (d) directs the Commission to hold hearings and approve or modify the proposed tariff and make the tariff effective January 1, 2002. The Commission intends to comply with this statutory scheme and set Entergy's transmission and distribution rates in this proceeding and will not require Entergy to file a rate case in November 2001.

As the statutory start date for retail competition approached, EGSI requested that the PUC, as authorized by section 39.103 of PURA, postpone the start of retail competition in EGSI's service area. In late 2001, in Docket No. 24469, EGSI, the staff of the PUC, and various other signatories [4] entered into an agreement (the "Settlement Agreement") whereby retail competition in EGSI's service territory would be postponed until September 15, 2002, or later if necessary. The Settlement Agreement was adopted in a December, 2001 PUC order. During the interim, EGSI would continue to charge its customers the rates frozen by Senate Bill 7.

In February 2002, Dale Shearer and several other EGSI ratepayers, the plaintiffs in the underlying case, brought suit in district court alleging that Entergy and EGSI breached the Merger Agreement when they entered into the Settlement Agreement because the two agreements' terms are inconsistent. That is, Shearer alleges that the Settlement Agreement conflicts with the Merger Agreement's requirement that a third proceeding be filed with the PUC and that certain merger-related savings inure to the ratepayers.

In the trial court, Entergy filed a Motion to Transfer Venue, a Motion to Dismiss for Want of Subject Matter Jurisdiction, and a Motion to Abate. After conducting multiple hearings, the trial court denied Entergy's motions. Entergy then sought a writ of mandamus from the court of appeals on the same motions, but was again denied. We agreed to consider Entergy's petition for writ of mandamus to determine if the trial court had subject matter jurisdiction over the lawsuit.

II. Mandamus

[1] **[2]** Mandamus relief is appropriate only if the court clearly abused its discretion and the relator has no adequate remedy by appeal. *In re Southwestern Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex.2000). As a general rule, mandamus does not lie to correct incidental trial court rulings when there is a remedy by appeal. *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex.1990) (concluding that mandamus was not appropriate to review trial court's ruling on plea to the jurisdiction).

[3] The reluctance to issue extraordinary writs to correct incidental trial court rulings can be traced to a desire to prevent parties from attempting to use the writ as a substitute for an authorized appeal. *See, e.g.,* ***321** *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202–03, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945) (recognizing that "hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from final judgment"). This Court has long held that the mere cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus review. *See Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648, 652 (1958) ("[T]hat there may be some delay in getting questions decided through the appellate process, or that court costs may thereby be increased, will not justify intervention by appellate courts through the extraordinary writ of mandamus.").

[4] In certain circumstances, we have recognized that incidental trial court rulings can be corrected by writ of mandamus. *See, e.g., Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex.1994) (concluding that mandamus was appropriate to resolve jurisdictional dispute between Texas and Minnesota courts that led to conflicting child custody orders); *State Bar of Tex. v. Jefferson*, 942 S.W.2d 575, 575–76 (Tex.1997) (granting mandamus relief after concluding that trial court was without jurisdiction to issue temporary restraining order staying administrative grievance proceeding).

[5] **[6]** In each of these instances, the Court exercised its jurisdiction not merely because inaction would have caused hardship to the parties, but because special, unique circumstances mandated the Court's intervention. Here, the possibility that Entergy will be forced to endure the "hardship" of a full-blown trial if we decline to issue a writ of mandamus is, in itself, not sufficient to dictate mandamus relief. But Entergy's hardship is not the only factor we consider in deciding whether mandamus is appropriate. We must also consider that if Entergy is correct in its assertion that the PUC has exclusive jurisdiction, permitting a trial to go forward would interfere with the important legislatively mandated function and purpose of the PUC. *Cf. State v. Sewell,* 487 S.W.2d 716, 719 (Tex.1972) (granting mandamus to vacate injunction barring Grievance Committee proceedings because injunction was "an interference with the grievance procedures authorized by ... the State Bar Act" and restating that mandamus may be appropriate when "the orderly processes of government" are disturbed); *U.S. Alkali,* 325 U.S. at 203–04, 65 S.Ct. 1120 (concluding that extraordinary writ would be appropriate to correct federal district court's denial of motion to dismiss complaint if Federal Trade Commission had jurisdiction). In short, if the PUC has exclusive jurisdiction in this dispute, the judicial appropriation of state agency authority would be a clear disruption of the "orderly processes of government." This disruption, coupled with the hardship imposed on Entergy by a postponed appellate review, warrants an exception to our general proscription against using mandamus to correct incidental trial court rulings.

III. Applicable Law

[7] **[8]** **[9]** **[10]** Entergy asserts that the PUC has exclusive jurisdiction over the dispute between Shearer and Entergy. An agency has exclusive jurisdiction when the Legislature has granted that agency the sole authority to make an initial determination in a dispute. *Subaru of Am. v. David McDavid Nissan,* 84 S.W.3d 212, 221 (Tex.2002); *Cash Am. Int'l, Inc. v. Bennett,* 35 S.W.3d 12, 18 (Tex.2000). Furthermore, "[i]f an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking review of the agency's action." *Cash Am.,* 35 S.W.3d at 15. Until the party has exhausted all administrative ***322** remedies, the trial court lacks subject matter jurisdiction and must dismiss any claim within the agency's exclusive jurisdiction. *David McDavid Nissan,* 84 S.W.3d at 221 (citing *Tex. Educ. Agency v. Cypress–Fairbanks Indep. Sch. Dist.,* 830 S.W.2d 88, 90 (Tex.1992)*; Tex. Bd. of Exam'rs in Optometry v. Carp,* 162 Tex. 1, 343 S.W.2d 242, 246 (Tex.1961)*).* Therefore, if Entergy's assertion that the PUC has exclusive jurisdiction is correct, the trial court lacks jurisdiction over the underlying lawsuit. Our primary inquiry then is whether the PUC has exclusive jurisdiction over the dispute. This is a question of law we review *de novo. David McDavid Nissan,* 84 S.W.3d at 222.

IV. Analysis

A

[11] **[12]** We begin our analysis by recognizing the constitutional presumption that district courts are authorized to resolve disputes. Pursuant to the Texas Constitution, a district court's jurisdiction "consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. art. V, § 8. An important corollary is that district courts are courts of general jurisdiction and generally have subject matter jurisdiction absent a showing to the contrary. *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 75 (Tex.2000). Notably, a similar presumption does not exist for administrative agencies, which may exercise only those powers the law confers upon them in clear and express statutory language and those reasonably necessary to fulfill a function or perform a duty that the Legislature has expressly placed with the agency. *David McDavid Nissan,* 84 S.W.3d at 220; *Pub. Util. Comm'n v. GTE–Southwest, Inc.,* 901 S.W.2d 401, 407 (Tex.1995).

The next step in the inquiry is to determine if the "Constitution or other law" conveys exclusive, appellate, or original jurisdiction on another court or administrative agency. Tex. Const. art. V, § 8. Here, Entergy asserts that PURA grants the PUC exclusive jurisdiction over Shearer's claims.

[13] Whether an agency has exclusive jurisdiction depends on statutory interpretation. *David McDavid Nissan,* 84 S.W.3d at 221. An agency has exclusive jurisdiction " 'when a pervasive regulatory scheme indicates that Congress intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.' " *Id.* (quoting Humphrey, Comment, *Antitrust Jurisdiction*

and Remedies in an Electric Utility Price Squeeze, 52 U. Chi. L.Rev. 1090, 1107 n. 3 (1985)). The same rule applies when our courts determine the intent of the Legislature. *David McDavid Nissan,* 84 S.W.3d at 221.

[14] **[15]** **[16]** In construing PURA or any other statute, our objective is to determine and give effect to the Legislature's intent. *City of San Antonio v. City of Boerne,* 111 S.W.3d 22, 25 (Tex.2003). We look to the " 'plain and common meaning of the statute's words.' " *Id.* (quoting *State v. Gonzalez,* 82 S.W.3d 322, 327 (Tex.2002)). When a statute's meaning is unambiguous, we interpret that statute according to its plain language. *Id*

[17] PURA's language is determinative in assessing whether the Legislature created a pervasive regulatory scheme intended to be the exclusive means by which the rates charged by successor entities as a result of a merger of electric utilities are addressed. Section 31.001 of PURA, a ***323** general provision entitled "Legislative Findings; Purpose of Subtitle," states:

> (a) This subtitle is enacted to protect the public interest inherent in the rates and services of electric utilities. The purpose of this subtitle is to establish a *comprehensive and adequate regulatory system* for electric utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the electric utilities.

PURA § 31.001(a) (emphasis added). In addition, section 32.001 of PURA describes the PUC's jurisdiction as follows:

> (a) Except as provided by Section 32.002 [governing municipally owned utilities], the Commission has *exclusive original jurisdiction* over the rates, operations, and services of an electric utility in:
>
> (1) areas outside a municipality; and
>
> (2) areas inside a municipality that surrenders its jurisdiction to the Commission under Section 33.002.

PURA § 32.001(a) (emphasis added). Thus, the statutory description of PURA as "comprehensive" demonstrates the Legislature's belief that PURA would comprehend all or virtually all pertinent considerations involving electric utilities operating in Texas. That is, PURA is intended to serve as a "pervasive regulatory scheme" of the kind contemplated in *David McDavid Nissan.*

Furthermore, section 32.001's specific grant to the PUC of "exclusive original jurisdiction" makes it clear that the Legislature intended this dispute regarding utility rates, operations, and services to begin its journey toward resolution at the PUC. Our conclusion that the phrase "exclusive original jurisdiction" grants the PUC exclusive jurisdiction is consistent with this Court's earlier jurisprudence. In *David McDavid Nissan,* we held that statutory language granting the Texas Motor Vehicle Board "exclusive original jurisdiction" meant exactly what it said: that the Texas Motor Vehicle Board has exclusive jurisdiction over matters governed by the Texas Motor Vehicle Commission Code. *David McDavid Nissan,* 84 S.W.3d at 223. We see no reason why identical language in PURA should be assigned a different meaning.

In cases like this one, where the Legislature clearly expresses its intent through statutory language, our exclusive jurisdiction inquiry is uncomplicated. Here, the Legislature's language demonstrates that it intended PURA to be the exclusive means of regulating electric utilities in Texas. The Legislature's description of PURA as "comprehensive," coupled with the fact that PURA regulates even the particulars of a utility's operations and accounting, demonstrates the statute's pervasiveness. *See, e.g.,* PURA § 14.202 (allowing PUC to audit utilities as frequently as needed); PURA § 36.056 (empowering PUC to establish proper rates of depreciation, amortization, and depletion); PURA § 38.004 (mandating clearance requirements for transmission and distribution lines). Accordingly, we conclude that the PUC has exclusive jurisdiction over the dispute between Entergy and Shearer.

B

Shearer attempts to categorize the Merger Agreement as a mere private contract. Shearer contends that because the plaintiffs are not directly challenging a PUC order, the PUC has no jurisdiction to settle the dispute. However, this argument fails to recognize that while the Merger Agreement may have begun as a private contract, it took on an administrative character when the parties agreed that the merger savings would be implemented "in post-merger Gulf States rate proceedings" filed with the PUC and requested ***324** that their agreement be placed in the PUC order resolving Docket No. 11292.

The Third Court of Appeals addressed a similar situation in *Public Utility Commission of Texas v. Southwestern Bell Telephone Co.*, 960 S.W.2d 116, 119–20 (Tex.App.—Austin 1997, no pet.):

> We hold that the power to conduct adjudicative proceedings, expressly delegated to the Commission in PURA section 16, necessarily includes the following incidental powers: (1) a power to accept and act upon an agreement between the parties that removes from dispute and litigation a subsidiary issue of fact or law, such as the parties' agreement pertaining to attorney's fees in this instance; (2) a power to interpret the agreement when a dispute arises subsequently in that regard; and (3) a power to formulate and award a reasonable remedy necessary to effectuate the agreement.

On rehearing, Southwestern Bell argued that the PUC, in interpreting the attorneys' fees agreement, was adjudicating a private contract right. The court of appeals responded:

> The agency record in the present case reveals, however, that the attorneys' fee agreement was more than a private agreement. It affected directly the public interest. The Commission's acceptance of the agreement ... was necessary to give the agreement the *administrative* effect required by the litigants. Based upon the Commission's acceptance of the agreement, the Commission formulated and issued a final order ... *fixing public utility rates.* We have held PURA section 16 and Texas Government Code section 2001.056 vested authority in the Commission for taking this administrative action. These statutes also placed in the Commission a power to decide as a *regulatory* matter the dispute that arose subsequently regarding the agreement, and to award an *administrative remedy* to rectify any administrative wrong and any resulting *administrative* consequences.

Id. at 122–23 (emphasis in original). Likewise, in this case, the Merger Agreement between Entergy, GSU, and the various other parties affected the public interest and, more importantly, was the basis for the PUC's regulatory approval of the Entergy/GSU merger. Without the PUC order implementing it, the Merger Agreement was practically meaningless. That is, the very administrative character that gives the Merger Agreement effect also gives the PUC the authority to adjudicate disputes arising from the agreement. *Cf. Cajun Elec. Power Coop., Inc. v. F.E.R.C.*, 924 F.2d 1132, 1135 (D.C.Cir.1991) ("Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss....").

V. Conclusion

We conclude that the PUC has exclusive jurisdiction over the dispute between Entergy and Shearer. Accordingly, we conditionally grant the writ of mandamus and direct the trial court to vacate its August 13, 2002 order denying Entergy's motion to dismiss, and to dismiss Shearer's suit against Entergy for lack of subject matter jurisdiction. We are confident that the trial court will promptly comply, and the writ will issue only if it does not.

Parallel Citations

47 Tex. Sup. Ct. J. 729

Footnotes

1 The defendants in the underlying lawsuit and the relators in this original proceeding are Entergy Corporation and its subsidiary Entergy Gulf States, Inc. Unless otherwise indicated, our references to "Entergy" encompass both Entergy Corporation and Entergy Gulf States, Inc. The plaintiffs below and the real parties in interest in this proceeding are Dale Shearer; Schooner Restaurants, Inc.;

Megas Enterprises, Inc.; Texas Cattle Baron Steak House, Inc.; and Michael G. Pearson. We refer to them collectively as "Shearer." Shearer requested class certification in the underlying lawsuit; however, no class certification order has been entered.

2 In addition to Entergy and GSU, the signatories to the agreement were the General Counsel of the PUC, the International Brotherhood of Electrical Workers Local 2286, and Texas Industrial Energy Consumers. The Office of the Public Utility Counsel was not a signatory but did sign a document stating that it was not opposed to a PUC order consistent with the agreement.

3 Section 42, which governed rate changes proposed by the PUC, is now codified at Tex. Util.Code §§ 36.151–156. Section 43, which governed rate changes proposed by a utility, is now codified at Tex. Util.Code §§ 36.101–111.

4 The other signatories were Texas Industrial Energy Consumers and CLECO Marketing and Trading L.L.C.

D. *In re Southwestern Bell Telephone Co., L.P.*

235 S.W.3d 619
Supreme Court of Texas.

In re SOUTHWESTERN BELL TELEPHONE COMPANY, L.P., Relator.

No. 05–0951. | Argued Jan. 24, 2007. | Decided Aug. 31, 2007.

Synopsis

Background: Customers brought putative class action against telephone company, claiming that it improperly collected the Texas Universal Service Fund (TUSF) surcharge from customers. The trial court denied company's plea to the jurisdiction. Company petitioned for writ of mandamus. The Court of Appeals denied petition. Company petitioned for writ of mandamus.

Holdings: The Supreme Court, Wallace B. Jefferson, C.J., held that:

[1] mandamus was an appropriate remedy to correct trial court's denial of plea to the jurisdiction;

[2] company did not waive its right to mandamus relief;

[3] Public Utilities Commission (PUC) had exclusive jurisdiction over claims; and

[4] Supreme Court would not direct trial court to abate new claims asserted by customers after trial court denied the plea to the jurisdiction.

Writ conditionally granted.

West Headnotes (15)

[1] Mandamus
Modification or vacation of judgment or order

Mandamus
Entertaining and proceeding with cause

Mandamus was an appropriate remedy to correct trial court's denial of a plea to the jurisdiction based on Public Utilities Commission's (PUC's) exclusive jurisdiction over claims that telephone company improperly collected the Texas Universal Service Fund (TUSF) surcharge from customers; allowing the trial court to proceed if the PUC had exclusive jurisdiction would disrupt the orderly processes of government, and postponed appellate review would impose hardship on telephone company.

6 Cases that cite this headnote

[2] Mandamus
Remedy by Appeal or Writ of Error

Mandamus
Matters of discretion

Mandamus relief is an extraordinary remedy that issues only if the court clearly abused its discretion and the relator has no adequate remedy by appeal.

87 Cases that cite this headnote

[3] Mandamus
Modification or vacation of judgment or order

Statute providing for interlocutory appeal of a trial court order denying a class action defendant's plea to the jurisdiction based on an agency's exclusive or primary jurisdiction did not provide telephone company that allegedly improperly collected the Texas Universal Service Fund (TUSF) surcharge from customers an adequate remedy by appeal, for purposes of determining if mandamus relief was available to correct trial court's denial of plea to the jurisdiction; customers' action against telephone company was filed before effective date of statute. V.T.C.A., Civil Practice & Remedies Code § 26.051(b).

12 Cases that cite this headnote

[4] Mandamus
Time to Sue, Limitations, and Laches

Telephone company's delay in filing mandamus petition with Supreme Court until more than a year after the court of appeals denied mandamus

relief was justified, and thus company did not waive its right to mandamus relief from trial court's denial of a plea to the jurisdiction based on Public Utilities Commission's (PUC's) exclusive jurisdiction over customers' claims; removal of case to federal court, after the court of appeals denied mandamus relief, prohibited the state court from taking further action until federal court remanded the case to state court 11 months later.

6 Cases that cite this headnote

[5] Telecommunications

Primary jurisdiction; administrative or judicial jurisdiction

Public Utilities Commission (PUC) had exclusive jurisdiction over customers' claims that, in substance, asked the trial court to declare that the Texas Universal Service Fund (TUSF) surcharge violated Public Utility Regulatory Act and order telephone company to return the surcharge to its customers; the specific grant to the PUC of exclusive original jurisdiction over the business and property of a telecommunications utility made it clear that the Legislature intended dispute to begin its journey toward resolution at the PUC. V.T.C.A., Utilities Code § 52.002(a).

3 Cases that cite this headnote

[6] Courts

Presumptions and Burden of Proof as to Jurisdiction

District courts are presumed to be authorized to resolve disputes unless the Constitution or other law conveys exclusive jurisdiction on another court or administrative agency.

4 Cases that cite this headnote

[7] Administrative Law and Procedure

Primary jurisdiction

An agency has exclusive jurisdiction when a pervasive regulatory scheme indicates that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.

10 Cases that cite this headnote

[8] Appeal and Error

Cases Triable in Appellate Court

Whether an agency has exclusive jurisdiction is a matter of law that is reviewed de novo.

4 Cases that cite this headnote

[9] Administrative Law and Procedure

Exhaustion of administrative remedies

If an agency has exclusive jurisdiction to resolve a dispute, a party must first exhaust administrative remedies before a trial court has subject matter jurisdiction.

11 Cases that cite this headnote

[10] Telecommunications

Universal service

Public Utility Regulatory Act is intended to serve as a pervasive regulatory scheme that governs the Texas Universal Service Fund. V.T.C.A., Utilities Code § 56.001 et seq.

Cases that cite this headnote

[11] Telecommunications

Powers of commissions and agencies

Legislature granted the Public Utilities Commission the authority to approve a Texas Universal Service Fund (TUSF) surcharge, regulate a service provider's collection of the surcharge, hear disputes between customers and service providers concerning the TUSF, and grant refunds where appropriate. V.T.C.A., Utilities Code §§ 15.021, 15.023, 17.157(a), (b)(1, 3, 6), 52.002(a), 56.023(a)(1), (d).

Cases that cite this headnote

[12] Telecommunications

Primary jurisdiction; administrative or judicial jurisdiction

Customers' request for attorney fees, presumably pursuant to the Declaratory Judgment Act, could not operate to vest trial court with jurisdiction over claims that telephone company improperly collected the Texas Universal Service Fund (TUSF) surcharge from customers; claims fell within Public Utilities Commission's (PUC's) exclusive jurisdiction. V.T.C.A., Civil Practice & Remedies Code § 37.009.

1 Cases that cite this headnote

[13] Telecommunications

Primary jurisdiction; administrative or judicial jurisdiction

Public Utilities Commission's exclusive jurisdiction over the Texas Universal Service Fund surcharge is not affected by Public Utility Regulatory Act's rate cap provisions. V.T.C.A., Utilities Code §§ 56.002, 58.061.

Cases that cite this headnote

[14] Telecommunications

Universal service

While the Public Utilities Commission can not determine the reasonableness of switched access rates, it must nonetheless carry out its duties pursuant to regulatory scheme governing the Texas Universal Service Fund. V.T.C.A., Utilities Code §§ 56.021–56.023, 58.025(a).

Cases that cite this headnote

[15] Telecommunications

Findings and determination; modification or vacation and further review

Supreme Court would not direct trial court, which abused its discretion in denying telephone company's jurisdictional plea, to abate new claims asserted by customers after trial court denied the plea, but rather, would direct trial court to conduct further proceedings consistent with Supreme Court's opinion, where telephone company had not yet filed a jurisdictional plea as to the new claims, and the parties had not briefed or presented those issues to the trial court.

Cases that cite this headnote

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Opinion

Chief Justice JEFFERSON delivered the opinion of the Court.

In this original proceeding, we must decide whether the Public Utilities Commission (PUC) has exclusive jurisdiction over claims that Southwestern Bell Telephone (SWBT) [1] improperly collected the Texas Universal Service Fund (TUSF) surcharge from customers. We conclude that the PUC has exclusive jurisdiction and conditionally grant relief.

I

Background

This dispute involves the interplay of several facets of telecommunications regulation: universal service, switched access rates, incentive regulation, and the Texas Universal Service Fund surcharge.

A

Universal Service

Universal service—that is, "adequate and efficient telecommunications service" ***622** available to all citizens at "just, fair, and reasonable rates"—has long been a policy objective of our state and national governments. TEX. UTIL.CODE § 52.001(a); *see also* 47 U.S.C. § 151 (2000); *AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 521–22 n. 18 (Tex.2006). Achieving this goal requires subsidization of rural and residential service that would otherwise be prohibitively expensive. *AT & T*, 186 S.W.3d at 521. In the past, switched access rates—rates paid by long-distance carriers to local carriers so that long-distance customers could access local networks—were used to subsidize universal service. Pub. Util. Comm'n of Tex., *Scope of Competition in Telecommunications Markets of Texas* at 82 (Jan.1999). These rates were priced higher than their cost, in part so that local carriers could recoup the expense of providing service in high-cost rural areas of the state. *Id.*

B

Incentive Regulation

This system changed, however, in 1995 when the Legislature's amendments to PURA introduced incentive regulation.[2] *See* Act of May 16, 1995, 74th Leg., R.S., ch. 231, § 49, 1995 Tex. Gen. Laws 2017, 2045–53 (current version at TEX. UTIL.CODE ch. 58). These amendments permitted local carriers to opt out of the traditional regulatory framework if they agreed to cap rates for basic services, including switched access rates, at 1995 levels for four years. TEX. UTIL.CODE §§ 58.021, 58.051, 58.054; *AT & T*, 186 S.W.3d at 522–23. In exchange, the carrier could not, "under any circumstances, [be] subject to a complaint, hearing, or determination regarding the reasonableness of the company's: (1) rates; (2) overall revenues; (3) return on invested capital; or (4) net income." TEX. UTIL.CODE § 58.025(a); *see* Act of May 16, 1995, 74th Leg., R.S., ch. 231, § 49, 1995 Tex. Gen. Laws 2017, 2046, formerly TEX.REV.CIV. STAT. art. 1446c–0, § 3.352(d), recodified by Act of May 8, 1997, 75th Leg., R.S., ch. 166, § 1, 1997 Tex. Gen. Laws 713, 864. Because switched access rates were capped, the funds available to subsidize universal service could not increase and, due to competitive pressures, might decrease. *AT & T*, 186 S.W.3d at 521–22. SWBT elected incentive regulation.

C

TUSF Surcharge

Partially in response to the effects of incentive regulation, the Legislature substantially amended the universal service subchapter of PURA in 1997, *see* Act of May 8, 1997, 75th Leg., R.S., ch. 166 § 1, 1997 Tex. Gen. Laws 850, directing the PUC to "adopt and enforce rules ... to establish a universal service fund" that is "funded by a statewide uniform charge payable by each telecommunications provider that has access to the customer base." TEX. UTIL.CODE §§ 56.021, 56.022(a). The PUC promulgated a rule allowing providers to recover their portion of the TUSF from retail customers via a "Texas Universal Service" surcharge, assessed as a percentage of the customer's bill, excluding Lifeline and Link Up services. 16 TEX. ADMIN. CODE § 26.420(f)(6). The TUSF plan includes programs that, in conjunction with the Federal Universal Service Fund, assist telecommunications providers in providing basic local services at reasonable rates in high cost rural areas. ***623** Pub. Util. Comm'n of Tex., *Scope of Competition in Telecommunications Markets of Texas* at 41 (Jan.2007). The PUC approved SWBT's application to add the TUSF surcharge, and SWBT has been collecting it since 1999.

D

Procedural History

Plaintiffs Debbie Clara Trevino, Arnoldo Benavides, and Annette Muniz, individually and as representatives of a putative class consisting of all SWBT residential customers in Texas, sued SWBT in Hidalgo County district court. Plaintiffs alleged that SWBT's electing incentive regulation under chapter 58 of the Public Utility Regulatory Act (PURA) violated that chapter's rate cap provisions because it also collected the TUSF under chapter 56. Specifically, plaintiffs alleged:

> By applying the [TUSF] charge to the total bills of its residential customers,

> SWBT effectively increases the rate charged for many of the basic network services listed in TEX. UTIL.CODE § 58.051(a). Since it was not a rate charged for basic network services on June 1, 1995, Plaintiffs allege SWBT's [TUSF] charge violates SWBT's rate freeze agreement under the incentive regulation found in Chapter 58 of the PURA. Plaintiffs allege that SWBT's billing of its [TUSF] charge for basic network services has resulted and continues to result in monthly overcharges to SWBT's residential customers. Plaintiffs are not challenging the reasonableness of SWBT's rates. Plaintiffs are challenging the legality of SWBT's [TUSF] charge for basic network services, in light of its rate freeze agreement under TEX. UTIL.CODE § 58.021.

Plaintiffs sought a declaration that SWBT's TUSF charge was a rate charged for basic network services and that SWBT increased that rate in violation of its rate freeze agreement, as well as an order requiring SWBT to refund the [TUSF] to its customers [3] (the "core claims"). Plaintiffs also requested attorney's fees. SWBT filed a plea to the jurisdiction, arguing that the PUC had exclusive jurisdiction over the core claims, and the trial court denied it. The court of appeals denied mandamus relief, 235 S.W.3d 811, and SWBT now seeks a writ of mandamus from this Court. [4]

II

Analysis

A

Mandamus

[1] [2] [3] Initially, we address whether mandamus is appropriate. Mandamus relief is an extraordinary remedy that issues only if the court clearly abused its discretion and the relator has no adequate remedy by appeal. *In re Entergy Corp.*, 142 S.W.3d 316, 320 (Tex.2004). We recently addressed whether mandamus should lie to correct a trial court's denial of a plea to the jurisdiction based on an agency's exclusive jurisdiction and concluded that:

> if the PUC has exclusive jurisdiction in this dispute, the judicial appropriation of state agency authority would be a clear disruption of the 'orderly processes of government.' This disruption, coupled with the hardship imposed on [the relator] by a postponed appellate review, ***624** warrants an exception to our general proscription against using mandamus to correct incidental trial court rulings.

Id. at 321 (quoting *State v. Sewell*, 487 S.W.2d 716, 719 (Tex.1972)). That analysis applies here. Allowing the trial court to proceed if the PUC has exclusive jurisdiction would disrupt the orderly processes of government. That, coupled with the hardship occasioned by postponed appellate review, makes mandamus an appropriate remedy. [5]

[4] Plaintiffs argue that SWBT's petition for writ of mandamus is untimely because SWBT did not file its mandamus petition with this Court until more than a year after the court of appeals denied relief. Plaintiffs rely on *Rivercenter Associates v. Rivera*, 858 S.W.2d 366, 367–68 (Tex.1993), in which we denied mandamus relief to a party who waited over four months to file a mandamus petition. We concluded that the defendant had not shown diligent pursuit of its rights and that the record revealed no justification for the delay. *Id.* In the present case, however, SWBT's delay was justified. After the court of appeals denied mandamus relief, plaintiffs alleged that SWBT violated its tariff with the Federal Communications Commission. [6] SWBT removed the case to federal district court, and that court remanded the case to state court eleven months later. From the time the case was removed to federal court until it was remanded to state court, the state court was prohibited from taking further action. *See* 28 U.S.C § 1446(d) (The filing of a notice of removal with the state court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded."). Under these circumstances, SWBT did not waive its right to mandamus relief.

B

The PUC's Jurisdiction

[5] Now we must decide whether the core claims fall within the PUC's exclusive jurisdiction. SWBT argues that the PUC should resolve this dispute because chapter 56 creates a comprehensive regulatory scheme for universal service in Texas, giving the PUC exclusive original jurisdiction. Plaintiffs argue that because SWBT elected incentive regulation, section 58.025 prohibits the PUC from hearing this dispute. *See* TEX. UTIL.CODE § 58.025(a)(1).

[6] **[7]** **[8]** **[9]** We presume that district courts are authorized to resolve disputes unless the Constitution or other law conveys exclusive jurisdiction on another court or administrative agency. *Entergy*, 142 S.W.3d at 322. An agency has exclusive jurisdiction when a pervasive regulatory scheme indicates that the Legislature intended ***625** for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex.2002). Whether an agency has exclusive jurisdiction is a matter of law that we review de novo. *Id.* at 222. If an agency has exclusive jurisdiction to resolve a dispute, a party must first exhaust administrative remedies before a trial court has subject matter jurisdiction. *Id.*

[10] We recently held that "PURA is intended to serve as a 'pervasive regulatory scheme' of the kind contemplated in *David McDavid Nissan*." *Entergy*, 142 S.W.3d at 323 (concluding that the PUC has exclusive jurisdiction to hear a dispute between two electric companies). The same reasoning applies to this dispute. In section 52.002(a), the Legislature specifically granted the PUC "exclusive original jurisdiction over the business and property of a telecommunications utility." TEX. UTIL.CODE § 52.002(a). In addition to this explicit grant of exclusive original jurisdiction, chapter 56 constitutes a comprehensive regulatory scheme for a Texas Universal Service Fund administered by the PUC. Section 56.021 directs the PUC to "adopt and enforce rules requiring local exchange companies to establish a universal service fund." *Id.* § 56.021. Section 56.022 provides that the universal service fund shall be funded by a uniform statewide charge paid "in accordance with procedures approved by the commission." *Id.* § 56.022. Section 56.023 directs the PUC to "adopt eligibility criteria and review procedures, including a method for administrative review ... to fund the universal service fund and make distributions from that fund." *Id.* § 56.023(a)(1). Thus, PURA is intended to serve as a pervasive regulatory scheme that governs the Texas Universal Service Fund.

Plaintiffs argue that the PUC does not have jurisdiction because it cannot grant the relief they request. A close inspection of Plaintiffs' claims, however, reveals that the Legislature intended that the PUC determine this type of dispute and gave it the power to grant the relief requested. Plaintiffs' first amended petition, the live pleading when the trial court heard SWBT's jurisdictional plea, asserts various claims [7] that, in substance, asked the trial court to (1) declare that the TUSF surcharge violates PURA; and (2) order SWBT to return the surcharge (including accrued interest) to its customers.

[11] **[12]** The PUC, as the administrator of the TUSF, has the authority to grant such relief and has the expertise to decide this matter. The Legislature granted the PUC "the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction." TEX. UTIL.CODE § 14.001. With regard to the TUSF specifically, the Legislature directed the PUC to "adopt eligibility criteria and *review procedures, including a method for administrative review*, the commission finds necessary *to fund the universal service fund* " and the PUC "shall adopt rules for the administration of the universal service fund ... and may *act as necessary and convenient to administer the fund*." *Id.* § 56.023(a)(1), (d) (emphasis added). For billing disputes, the PUC's authority is even more comprehensive, as it may "resolve disputes between a ***626** retail customer and a billing utility, service provider, [or] telecommunications utility." *Id.* § 17.157(a). In exercising its authority in resolving disputes, the PUC may investigate an alleged violation, order a service provider to produce information or records, and require a service provider to "refund or credit overcharges or unauthorized charges with interest." *Id.* § 17.157(b)(1), (3), and (6). The PUC also has the authority to seek to enjoin a utility from engaging in acts that violate PURA, and it can assess administrative penalties against that utility. *Id.* § 15.021, .023. These provisions, along with the Legislature's grant to the PUC of "exclusive original jurisdiction over the business and property of a telecommunications utility," *id.* § 52.002(a), establish that the Legislature granted the PUC the authority to approve a TUSF surcharge, regulate a service provider's

collection of the surcharge, hear disputes between customers and service providers concerning the TUSF, and grant refunds where appropriate. Moreover, plaintiffs' request for core-claim attorney's fees, presumably pursuant to the declaratory judgment act, TEX. CIV. PRAC. & REM.CODE § 37.009, cannot operate to vest the trial court with jurisdiction where there was none before. *Cf. Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir.1998) (noting that, "[a]lthough the Texas [Declaratory Judgment Act] expressly provides for attorney's fees, it functions solely as a procedural mechanism for resolving substantive 'controversies which are already within the jurisdiction of the courts' ") (quoting *Housing Authority v. Valdez*, 841 S.W.2d 860, 864 (Tex.App.-Corpus Christi 1992, writ denied)). As we explained in *Entergy*, the "specific grant to the PUC of 'exclusive original jurisdiction' makes it clear that the Legislature intended this dispute ... to begin its journey toward resolution at the PUC." *Entergy*, 142 S.W.3d at 323. Accordingly, we conclude that the PUC has exclusive jurisdiction over the core claims.

[13] Plaintiffs attempt to cast some of their claims as a violation of chapter 58's rate caps (over which they assert the PUC lacks jurisdiction), but the pleadings demonstrate that their real point of contention is with the TUSF surcharge. Even if chapter 58 were implicated, two statutory provisions indicate that chapter 56—the TUSF chapter—controls over chapter 58. First, section 56.002 provides that if chapter 56 conflicts with another provision, chapter 56 prevails. TEX. UTIL.CODE § 56.002. Second, section 58.061 states that "[t]his subchapter [chapter 58] does not affect a charge permitted under ... Subchapter B, Chapter 56." *Id.* § 58.061. Thus, the PUC's exclusive jurisdiction over the TUSF surcharge is not affected by the chapter 58's rate cap provisions.

[14] Our recent decision in *AT & T Communications of Texas v. Southwestern Bell Telephone*, 186 S.W.3d 517 (Tex.2006), also supports this conclusion. In *AT & T*, we determined that while the PUC cannot reduce switched access rates or determine their reasonableness, it is obligated to uphold duties listed in other provisions. *Id.* at 531–32. We specifically noted that "[t]he Commission's lack of authority to reduce switched access rates does not preclude it from determining that they have an anticompetitive effect and attempting to fashion an appropriate remedy within its power." *Id.* at 531. Likewise, in this case, while the PUC cannot determine the reasonableness of switched access rates under chapter 58, *see* TEX. UTIL.CODE § 58.025(a), it must nonetheless carry out its duties pursuant to chapter 56's regulatory scheme. *See, e.g.*, TEX. UTIL.CODE § 56.021–.023.

***627 C**

New claims asserted after the jurisdictional plea

[15] After the trial court denied SWBT's jurisdictional plea, plaintiffs filed several amended petitions asserting new claims for breach of contract and violations of the Texas Deceptive Trade Practices–Consumer Protection Act, some of which pertain not to the TUSF, but to SWBT's "Touch-tone" charges. SWBT's plea to the jurisdiction was limited to the core claims, and its request for mandamus relief asks that we order the trial court to dismiss "those claims pending at the time [the trial court] denied Relator's Plea to the Jurisdiction." SWBT asserts that our decision on the core claims "may prove helpful to both the trial court and the litigants in resolving jurisdiction over the newly added [claims], and any future claims as well." We agree. SWBT also asks that we order the trial court to stay all claims not addressed by SWBT's plea to the jurisdiction pending the PUC's determination of the core claims, or that we direct the trial court to vacate its order denying the plea and conduct further proceedings consistent with this opinion. Although abatement may well be appropriate, we believe the latter course is the more prudent. SWBT has not yet filed a jurisdictional plea as to the new claims, and the parties have not briefed or presented those issues to the trial court. *See In re Perritt*, 992 S.W.2d 444, 446 (Tex.1999). Should SWBT file such a plea as to the new claims, the trial court may consider it with the benefit of this opinion and our recent decision in *In re Sw. Bell Tel. Co., L.P.*, 226 S.W.3d 400 (Tex.2007) (holding that trial court abused its discretion in refusing to abate claims within the PUC's primary jurisdiction).

III

Conclusion

We conclude that the PUC has exclusive jurisdiction over the core claims, and the trial court abused its discretion in denying SWBT's jurisdictional plea. Accordingly, we conditionally grant the writ of mandamus as to those claims and direct the trial court to (1) vacate its January 6, 2004, order denying SWBT's motion to dismiss; (2) dismiss the core claims for

lack of subject matter jurisdiction; and (3) conduct further proceedings consistent with this opinion. TEX.R.APP. P. 52.8(c); *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 227 (Tex.2004). We are confident the trial court will promptly comply, and the writ will issue only if it does not.

Justice WILLETT did not participate in the decision.

Parallel Citations

50 Tex. Sup. Ct. J. 1178, 42 Communications Reg. (P&F) 755

Footnotes

1 SWBT notes that the style incorrectly uses the name "Southwestern Bell Telephone Company, L.P.," as its correct name is "Southwestern Bell Telephone, L.P." Because the parties and lower courts retained the original style, we retain that style but refer to SWBT by its correct name in our opinion.

2 The 1995 PURA amendments and the federal Telecommunications Act of 1996 opened local exchange service to competition. *AT & T*, 186 S.W.3d at 522. Incentive regulation was intended to facilitate this transition. *Id.*

3 The refund allegations were pleaded both as a request for injunctive relief as well as an unjust enrichment claim.

4 The Public Utility Commission, Texas Statewide Telephone Cooperative, Inc., and The Texas Telephone Association submitted amicus briefs in support of SWBT's petition for writ of mandamus.

5 Plaintiffs contend that SWBT has an adequate remedy by appeal because section 26.051(b) of the Civil Practice and Remedies Code (added as part of House Bill 4) provides for interlocutory appeal of a trial court order denying a class action defendant's plea to the jurisdiction based on an agency's exclusive or primary jurisdiction. TEX. CIV. PRAC. & REM.CODE § 26.051(b). Because this action was filed prior to September 1, 2003, however, new section 26.051 does not apply. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 23.02(d), 2003 Tex. Gen. Laws 847, 899 (eff. Sept. 1, 2003) ("Except as otherwise provided in this section or by a specific provision in an article, this Act applies only to an action filed on or after the effective date of this Act. An action filed before the effective date of this Act, including an action filed before that date in which a party is joined or designated after that date, is governed by the law in effect immediately before the change in law made by this Act, and that law is continued in effect for that purpose.").

6 Like the core claims, this allegation is based on Plaintiffs' claim that SWBT had no authority to collect the TUSF surcharge.

7 Plaintiffs also asserted some claims in terms of rate cap violations under chapter 58. We address that argument below.

E. CPRC 51.014

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle D. Appeals
Chapter 51. Appeals
Subchapter B. Appeals from County or District Court

V.T.C.A., Civil Practice & Remedies Code § 51.014

§ 51.014. Appeal from Interlocutory Order

Effective: September 1, 2013
Currentness

(a) A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9) denies all or part of the relief sought by a motion under Section 74. 351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351;

(10) grants relief sought by a motion under Section 74.351(l);

(11) denies a motion to dismiss filed under Section 90.007; or

<Text of subsec. (a)(12), as added by Acts 2013, 83rd Leg., ch. 44 (H.B. 200), § 1>

(12) denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to Section 75.0022.

<Text of subsec. (a)(12), as added by Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 4>

(12) denies a motion to dismiss filed under Section 27.003.

<Text of subsec. (b), as amended by Acts 2013, 83rd Leg., ch. 916 (H.B. 1366), § 1>

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) or in a suit brought under the Family Code, stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), or (8) also stays all other proceedings in the trial court pending resolution of that appeal.

<Text of subsec. (b), as amended by Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 4>

(b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) , stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal.

(c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

(2) the 180th day after the date the defendant files:

(A) the original answer;

(B) the first other responsive pleading to the plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

(d) On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:

(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and

(2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.

(d-1) Subsection (d) does not apply to an action brought under the Family Code.

(e) An appeal under Subsection (d) does not stay proceedings in the trial court unless:

(1) the parties agree to a stay; or

(2) the trial or appellate court orders a stay of the proceedings pending appeal.

(f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, § 3.10, eff. Sept. 1, 1987; Acts 1989, 71st Leg., ch. 915, § 1, eff. June 14, 1989; Acts 1993, 73rd Leg., ch. 855, § 1, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 1296, § 1, eff. June 20, 1997; Acts 2001, 77th Leg., ch. 1389, § 1, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 204, § 1.03, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 97, § 5, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 1051, §§ 1, 2, eff. June 18, 2005; Acts 2011, 82nd Leg., ch. 203 (H.B. 274), § 3.01, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 44 (H.B. 200), § 1, eff. May 16, 2013; Acts 2013, 83rd Leg., ch. 604 (S.B. 1083), § 1, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 916 (H.B. 1366), § 1, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 961 (H.B. 1874), § 1, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 4, eff. June 14, 2013.

Editors' Notes

REVISOR'S NOTE

2008 Main Volume

The revised law omits the reference to “term time or ... vacation” because it is unnecessary. Section 65.021 authorizes the judge to conduct the proceedings in term or vacation.

Notes of Decisions (1000)

V. T. C. A., Civil Practice & Remedies Code § 51.014, TX CIV PRAC & REM § 51.014
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

F. CPRC 101.001

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 5. Governmental Liability
Chapter 101. Tort Claims (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Civil Practice & Remedies Code § 101.001

§ 101.001. Definitions

Effective: June 17, 2011
Currentness

In this chapter:

(1) “Emergency service organization” means:

(A) a volunteer fire department, rescue squad, or an emergency medical services provider that is:

(i) operated by its members; and

(ii) exempt from state taxes by being listed as an exempt organization under Section 151.310 or 171.083, Tax Code; or

(B) a local emergency management or homeland security organization that is:

(i) formed and operated as a state resource in accordance with the statewide homeland security strategy developed by the governor under Section 421.002, Government Code; and

(ii) responsive to the Texas Division of Emergency Management in carrying out an all-hazards emergency management program under Section 418.112, Government Code.

(2) “Employee” means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

(3) “Governmental unit” means:

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;

(B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;

(C) an emergency service organization; and

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

(4) “Motor-driven equipment” does not include:

(A) equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state; or

(B) medical equipment, such as iron lungs, located in hospitals.

(5) “Scope of employment” means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.

(6) “State government” means an agency, board, commission, department, or office, other than a district or authority created under Article XVI, Section 59, of the Texas Constitution, that:

(A) was created by the constitution or a statute of this state; and

(B) has statewide jurisdiction.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 693, § 1, eff. June 19, 1987; Acts 1991, 72nd Leg., ch. 476, § 1, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 827, § 1, eff. Aug. 28, 1995; Acts 1997, 75th Leg., ch. 968, § 1, eff. Sept. 1, 1997; Acts 2011, 82nd Leg., ch. 1101 (S.B. 1560), § 1, eff. June 17, 2011.

Editors' Notes

REVISOR'S NOTE

2011 Main Volume

(1) In the definition of “employee” the source material allowing the employment to be either “full or part-time,” “elective or appointive,” and “supervisory or nonsupervisory” is omitted because the definition is not limited by

any of those conditions. Also, the statement of legislative intent to include "every person in such service" is omitted because the definition is written broadly enough to include those persons except as specifically exempted.

(2) In the definition of "governmental unit" the statement in the source law that no new units of government are hereby created is omitted because the definition does not create governmental units but only identifies those that exist.

(3) In the definition of "scope of employment" the word "acting" is omitted because the word is repeated in Section 101.021 creating liability. "Scope of office" is not defined because it means the same as "scope of employment."

Notes of Decisions (146)

V. T. C. A., Civil Practice & Remedies Code § 101.001, TX CIV PRAC & REM § 101.001
Current through the end of the 2013 Third Called Session of the 83rd Legislature

End of Document

G. Protocols Sections 16.2.7.3 and 16.2.7.4

16.2.7.3 Determination of Estimated Aggregate Liability

This subsection applies to all QSEs. After a QSE receives its first Invoice, ERCOT shall monitor daily and calculate, at least weekly, the QSE's Estimated Aggregate Liability (EAL) based on the formula below. Any QSE that is required to post security is responsible, at all times, for maintaining posted security at or above the amount of its EAL, minus the QSE's Unsecured Credit Limit.

EAL = Greater of ADTE or [Highest TEL or ADTE in effect during the previous 60-day period (adjusted for the SAF)] + OUT – TCR_{ar} + PUL

Where:

EAL = Estimated Aggregate Liability

TEL = Total Estimated Liability (as defined in Section 16.2.7 Determination of Total Estimated Liability)

ADTE = Average daily transaction, extrapolated, which is calculated as (ADT x 40 days x SAF)

ADT = Average daily transaction, which is calculated from (the sum of the Initial Settlement Statements included in the two most recent Settlement Invoices less the TCR Congestion credits for the same Invoice period to the extent Secured) / the number of Initial Settlement Statements included in the Invoices

OUT = Outstanding, unpaid transactions, which include outstanding Invoices + estimated unbilled items, to the extent not adequately accommodated in the ADTE calculation above (including but not limited to Balancing Energy, Ancillary Services, resettlements, final, and true-ups). Invoices will not be considered outstanding for purposes of this calculation if prepaid on or before the second (2^{nd}) Business Day following issuance of the Invoice

TCR_{ar} = TCR auction revenue as described in Section 7.5.4, Allocation Method and Timing for Distributing TCR Auction Revenues, estimated for the sixty (60) day forward period

SAF = Seasonal Adjustment Factor, which compares size of overall market settlement from statement to statement, and is used to more precisely forecast the liability in the period for which settlement data is not yet available. ERCOT shall set this factor equal to one (1)

PUL = Potential uplift, to the extent and in the proportion that a QSE represents Entities to which an uplift of a short payment will be made pursuant to Section 9.4.4, Partial Payments, item (6). The sum of:

(1) Amounts expected to be uplifted within one year of the date of the calculation; and

(2) Twenty-five percent (25%) [or such other percentage based on available statistics regarding default of reorganized Entities of any short payment amounts being repaid under a payment plan ordered

by a bankruptcy court for a defaulting QSE] of amounts due more than one year from the date of the calculation

Secured = The owner of the TCR credit has granted ERCOT a first priority security interest in receivables generated under or in connection with the TCR Account Holder Agreement to secure any and all obligations arising under: (i) the Standard Form Market Participant Agreement, (ii) any agreement identified in Section 16.1 and/or (iii) these Protocols.

To the extent that ERCOT, using commercially reasonable measures, determines that the EAL so calculated does not adequately match the financial risk to the MPs in the market in the ERCOT Region**,** ERCOT may specify a larger or smaller EAL than would be produced by the use of the above formula. ERCOT will, to the extent practical, exchange with the QSE that information utilized in determining credit requirements. ERCOT will provide written notification to the QSE of the basis for ERCOT's assessment of the QSE's financial risk.

16.2.7.4 Determination of Aggregate Net Load Imbalance Liability and Net Resource Imbalance Liability (NLRI)

This subsection applies to all QSEs. For any Invoice periods that have not been invoiced in which the sum of:

(1) The percentage by which a QSE's total estimated Load (MWh) differs from its scheduled Load (MWh); and

(2) The percentage by which a QSE's total estimated Resource (MWh) differs from its scheduled Resource (MWh)

exceeds twenty percent (20%), ERCOT will monitor daily and calculate, at least weekly, an aggregate incremental Net Load Imbalance Liability and Net Resource Imbalance Liability (NLRI), based on the formula below. Any QSE required to post security is responsible, at all times, for maintaining posted security at or above the amount of its EAL, plus its aggregate incremental NLRI minus its Unsecured Credit Limit.

NLRIq = SUM(NLRIqi)

NLRIqi = SUM(NLRIqiz)

NLRIqiz = (LIqiz + RRIqiz)

$$\mathbf{LI_{qiz} = -1 * (SL_{qiz} - EL_{qiz}) * MCPE_{iz} * PM}$$

$$\mathbf{RRI_{qiz} = (SG_{qiz} - EG_{qiz}) * MCPE_{iz} * PM}$$

Where:

i	interval being calculated
z	zone being settled
LI_{qiz}	Load Imbalance ($) per interval per zone per QSE
SL_{qiz}	Scheduled Load (MWh) per interval per zone per QSE
EL_{qiz}	Estimated Load (MWh) per interval per zone per QSE,
RRI_{qiz}	Relaxed Resource Imbalance ($) per interval per zone per QSE
SG_{qiz}	Scheduled Generation (MWh) per interval per zone per QSE
EG_{qiz}	Estimated Generation (MWh) per interval per zone per QSE,
$MCPE_{iz}$	Market Clearing Price of Energy ($/MWh) per interval per zone
PM	Price Multiplier (150% for periods projected forward, 100% for other periods)
NLRI	Net Load Imbalance Liability and Net Resource Imbalance Liability

1. Load Imbalance for Invoice periods that are completed but for which ERCOT has not issued an Invoice, is calculated as the higher of: (a) ERCOT's estimate of the QSE's Load Imbalance for the period or (b) the QSE's estimate of Load Imbalance for the period.

2. Load Imbalance for an Invoice period not yet completed, is calculated as the higher of: (a) ERCOT's estimate of the QSE's Load Imbalance for the most recent seven (7) day period, or (b) the QSE's forecast of Load Imbalance for the next seven (7) day period.

3. ERCOT shall use actual Resource Imbalance for Invoice periods that are completed but for which ERCOT has not issued an Invoice. For periods in which actual Resource Imbalance is not available, and for Invoice periods that are completed but for which ERCOT has not issued an Invoice, Resource Imbalance is calculated as the higher of: (a) ERCOT's estimate of the QSE's Resource Imbalance for the period, including both scheduled and unscheduled Balancing Energy Service, or (b) the QSE's estimated Resource Imbalance for the period.

4. ERCOT shall use actual Resource Imbalance for an Invoice period not yet completed. For periods in which actual Resource Imbalance is not available, and for an Invoice period not yet completed, Resource Imbalance is calculated as the higher of: (a) ERCOT's estimate of the QSE's Resource Imbalance, including both scheduled and unscheduled Balancing Energy Service, for the most recent seven (7) day period, or (b) the QSE's forecast of Resource Imbalance for the next seven (7) day period.

5. ERCOT will review the price per MWh and multiplier at least quarterly to ensure that no less than ninety-five percent (95%) of the price volatility for a one (1) year period is captured in the calculation. Changes to the PM factor will be reviewed and approved by the Finance and Audit Committee. ERCOT will provide notice to Market Participants of any change at least fourteen (14) days prior to the effective date along with the analysis supporting the change.

To the extent that ERCOT, using commercially reasonable measures, determines that the NLRI as calculated above does not adequately match the financial risk to Market Participants, ERCOT may specify a larger or smaller NLRI than that produced by using the above-referenced formula. ERCOT will, to the extent practical, exchange with the QSE the information ERCOT used in determining those credit requirements. ERCOT will provide written notification to the QSE of the basis for ERCOT's assessment of the QSE's financial risk and the applicable credit requirements.

H. The Standard Form Market Participant Agreement

Standard Form Market Participant Agreement
between
Hwy 3 MHP, LLC
and
Electric Reliability Council of Texas, Inc.

This Market Participant Agreement ("Agreement"), effective as of the 11th day of March, 2008 ("Effective Date"), is entered into by and between Hwy 3 MHP, LLC, a Texas Limited Liability Company ("Participant") and Electric Reliability Council of Texas, Inc., a Texas non-profit corporation ("ERCOT").

Recitals

WHEREAS:

A. As defined in the ERCOT Protocols, Participant is a (check all that apply):

☒ Load Serving Entity (LSE)

☒ Qualified Scheduling Entity (QSE)

☐ Transmission Service Provider (TSP)

☐ Distribution Service Provider (DSP)

☐ Congestion Revenue Right (CRR) Account Holder

☐ Resource Entity

☐ Renewable Energy Credit (REC) Account Holder

B. ERCOT is the Independent Organization certified under PURA §39.151 for the ERCOT Region; and

C. The Parties enter into this Agreement in order to establish the terms and conditions by which ERCOT and Participant will discharge their respective duties and responsibilities under the ERCOT Protocols.

Agreements

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, ERCOT and Participant (the "Parties") hereby agree as follows:

Section 1. Notice.

All notices required to be given under this Agreement shall be in writing, and shall be deemed delivered three (3) days after being deposited in the U.S. mail, first class postage prepaid, registered (or certified) mail, return receipt requested, addressed to the other Party at the address specified in this Agreement or shall be deemed delivered on the day of receipt if sent in another manner requiring a signed receipt, such as courier delivery or overnight delivery service. Either Party may change its address for such notices by delivering to the other Party a written notice referring specifically to this Agreement. Notices required under the ERCOT Protocols shall be in accordance with the applicable Section of the ERCOT Protocols.

If to ERCOT:

Electric Reliability Council of Texas, Inc.
Attn: Legal Department
7620 Metro Center Drive
Austin, Texas 78744-1654
Telephone: (512) 225-7000
Facsimile: (512) 225-7079

If to Participant:

Hwy 3 MHP, LLC
Regulatory Department
412 S Carroll Blvd., Suite 1000
Denton, Texas 76201
877-499-3647
888-202-1990

Section 2. Definitions.

A. Unless herein defined, all definitions and acronyms found in the ERCOT Protocols shall be incorporated by reference into this Agreement.

B. "ERCOT Protocols" shall mean the document adopted by ERCOT, including any attachments or exhibits referenced in that document, as amended from time to time, that contains the scheduling, operating, planning, reliability, and settlement (including customer registration) policies, rules, guidelines, procedures, standards, and criteria of ERCOT. For the purposes of determining responsibilities and rights at a given time, the ERCOT Protocols, as amended in accordance with the change procedure(s) described in the ERCOT Protocols, in effect at the time of the performance or non-performance of an action, shall govern with respect to that action.

Section 3. Term and Termination.

A. Term. The initial term ("Initial Term") of this Agreement shall commence on the Effective Date and continue until the last day of the month which is twelve (12) months from the Effective Date. After the Initial Term, this Agreement shall automatically renew

for one-year terms (a "Renewal Term") unless the standard form of this Agreement contained in the ERCOT Protocols has been modified by a change to the ERCOT Protocols. If the standard form of this Agreement has been so modified, then this Agreement will terminate upon the effective date of the replacement agreement. This Agreement may also be terminated during the Initial Term or the then-current Renewal Term in accordance with this Agreement.

B. Termination by Participant. Participant may, at its option, terminate this Agreement:

(1) immediately upon the failure of ERCOT to continue to be certified by the PUCT as the Independent Organization under PURA §39.151 without the immediate certification of another Independent Organization under PURA §39.151;

(2) if the "REC Account Holder" box is checked in Section A. of the *Recitals* section of this Agreement, Participant may, at its option, terminate this Agreement immediately if the PUCT ceases to certify ERCOT as the entity approved by the PUCT ("Program Administrator") for carrying out the administrative responsibilities related to the Renewable Energy Credit Program as set forth in PUC Substantive Rule 25.173(g) without the immediate certification of another Program Administrator under PURA §39.151; or

(3) for any other reason at any time upon thirty days written notice to ERCOT.

C. Effect of Termination and Survival of Terms. If this Agreement is terminated by a Party pursuant to the terms hereof, the rights and obligations of the Parties hereunder shall terminate, except that the rights and obligations of the Parties that have accrued under this Agreement prior to the date of termination shall survive.

Section 4. Representations, Warranties, and Covenants.

A. Participant represents, warrants, and covenants that:

(1) Participant is duly organized, validly existing and in good standing under the laws of the jurisdiction under which it is organized and is authorized to do business in Texas;

(2) Participant has full power and authority to enter into this Agreement and perform all obligations, representations, warranties and covenants under this Agreement;

(3) Participant's past, present and future agreements or Participant's organizational charter or bylaws, if any, or any provision of any indenture, mortgage, lien, lease, agreement, order, judgment, or decree to which Participant is a party or by which its assets or properties are bound do not materially affect performance of Participant's obligations under this Agreement;

(4) Market Participant's execution, delivery and performance of this Agreement by Participant have been duly authorized by all requisite action of its governing body;

(5) Except as set out in an exhibit (if any) to this Agreement, ERCOT has not, within the twenty-four (24) months preceding the Effective Date, terminated for Default any Prior Agreement with Participant, any company of which Participant is a successor in interest, or any Affiliate of Participant;

(6) If any Defaults are disclosed on any such exhibit mentioned in subsection 4.A(5), either (a) ERCOT has been paid, before execution of this Agreement, all sums due to it in relation to such Prior Agreement, or (b) ERCOT, in its reasonable judgment, has determined that this Agreement is necessary for system reliability and Participant has made alternate arrangements satisfactory to ERCOT for the resolution of the Default under the Prior Agreement;

(7) Participant has obtained, or will obtain prior to beginning performance under this Agreement, all licenses, registrations, certifications, permits and other authorizations and has taken, or will take prior to beginning performance under this Agreement, all actions required by applicable laws or governmental regulations except licenses, registrations, certifications, permits or other authorizations that do not materially affect performance under this Agreement;

(8) Participant is not in violation of any laws, ordinances, or governmental rules, regulations or order of any Governmental Authority or arbitration board materially affecting performance of this Agreement and to which it is subject;

(9) Participant is not Bankrupt, does not contemplate becoming Bankrupt nor, to its knowledge, will become Bankrupt;

(10) Participant acknowledges that it has received and is familiar with the ERCOT Protocols; and

(11) Participant acknowledges and affirms that the foregoing representations, warranties and covenants are continuing in nature throughout the term of this Agreement. For purposes of this Section, "materially affecting performance" means resulting in a materially adverse effect on Participant's performance of its obligations under this Agreement.

B. ERCOT represents, warrants and covenants that:

(1) ERCOT is the Independent Organization certified under PURA §39.151 for the ERCOT Region;

(2) ERCOT is duly organized, validly existing and in good standing under the laws of Texas, and is authorized to do business in Texas;

(3) ERCOT has full power and authority to enter into this Agreement and perform all of ERCOT's obligations, representations, warranties and covenants under this Agreement;

(4) ERCOT's past, present and future agreements or ERCOT's organizational charter or bylaws, if any, or any provision of any indenture, mortgage, lien, lease, agreement, order, judgment, or decree to which ERCOT is a party or by which its assets or properties are bound do not materially affect performance of ERCOT's obligations under this Agreement;

(5) The execution, delivery and performance of this Agreement by ERCOT have been duly authorized by all requisite action of its governing body;

(6) ERCOT has obtained, or will obtain prior to beginning performance under this Agreement, all licenses, registrations, certifications, permits and other authorizations and has taken, or will take prior to beginning performance under this Agreement, all actions required by applicable laws or governmental regulations except licenses, registrations, certifications, permits or other authorizations that do not materially affect performance under this Agreement;

(7) ERCOT is not in violation of any laws, ordinances, or governmental rules, regulations or order of any Governmental Authority or arbitration board materially affecting performance of this Agreement and to which it is subject;

(8) ERCOT is not Bankrupt, does not contemplate becoming Bankrupt nor, to its knowledge, will become Bankrupt; and

(9) ERCOT acknowledges and affirms that the foregoing representations, warranties, and covenants are continuing in nature throughout the term of this Agreement. For purposes of this Section, "materially affecting performance" means resulting in a materially adverse effect on ERCOT's performance of its obligations under this Agreement.

Section 5. Participant Obligations.

A. Participant shall comply with, and be bound by, all ERCOT Protocols.

B. Participant shall not take any action, without first providing written notice to ERCOT and reasonable time for ERCOT and Market Participants to respond, that would cause a Market Participant within the ERCOT Region that is not a "public utility" under the Federal Power Act or ERCOT itself to become a "public utility" under the Federal Power Act or become subject to the plenary jurisdiction of the Federal Energy Regulatory Commission.

Section 6. ERCOT Obligations.

A. ERCOT shall comply with, and be bound by, all ERCOT Protocols.

B. ERCOT shall not take any action, without first providing written notice to Participant and reasonable time for Participant and other Market Participants to respond, that would cause Participant, if Participant is not a "public utility" under the Federal Power Act, or ERCOT itself to become a "public utility" under the Federal Power Act or become subject to the plenary jurisdiction of the Federal Energy Regulatory Commission. If ERCOT receives any notice similar to that described in Section 5.B. from any Market Participant, ERCOT shall provide notice of same to Participant.

Section 7. Payment.

For the transfer of any funds under this Agreement directly between ERCOT and Participant and pursuant to the Settlement procedures for Ancillary Services described in the ERCOT Protocols, the following shall apply:

A. Participant appoints ERCOT to act as its agent with respect to such funds transferred and authorizes ERCOT to exercise such powers and perform such duties as described in this Agreement or the ERCOT Protocols, together with such powers or duties as are reasonably incidental thereto.

B. ERCOT shall not have any duties, responsibilities to, or fiduciary relationship with Participant and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement except as expressly set forth herein or in the ERCOT Protocols.

Section 8. Default.

A. Event of Default.

(1) Failure to make payment or transfer funds, provide collateral or designate/maintain an association with a QSE (if required by the ERCOT Protocols) as provided in the ERCOT Protocols shall constitute a material breach and shall constitute an event of default ("Default") unless cured within two (2) Business Days after the non-breaching Party delivers to the breaching Party written notice of the breach. Provided further that if such a material breach, regardless of whether the breaching Party cures the breach within the allotted time after notice of the material breach, occurs more than three (3) times in a twelve-month period, the fourth such breach shall constitute a Default by the breaching Party.

(2) For any material breach other than a material breach described in Section 8(A)(1) the occurrence and continuation of any of the following events shall constitute an event of Default by Participant:

(a) Except as excused under subsection (4) or (5) below, a material breach, other than a material breach described in Section 8(A)(1), of this Agreement by Participant, including any material failure by Participant to comply with the ERCOT Protocols, unless cured within fourteen (14) Business Days after delivery by ERCOT of written notice of the material breach to Participant. Participant must begin work or other efforts within three (3) Business Days to cure such material breach after delivery by ERCOT of written notice of such material breach by Participant and must prosecute such work or other efforts with reasonable diligence until the breach is cured. Provided further that if a material breach, regardless of whether such breach is cured within the allotted time after notice of the material breach, occurs more than three (3) times within twelve-month period, the fourth such breach shall constitute a Default.

(b) Participant becomes Bankrupt, except for the filing of a petition in involuntary bankruptcy, or similar involuntary proceedings, that is dismissed within 90 days thereafter.

(3) Except as excused under subsection (4) or (5) below, a material breach of this Agreement by ERCOT, including any material failure by ERCOT to comply with the ERCOT Protocols, other than a failure to make payment or transfer funds, shall constitute a Default by ERCOT unless cured within fourteen (14) Business Days after delivery by Participant of written notice of the material breach to ERCOT. ERCOT must begin work or other efforts within three (3) Business Days to cure such material breach after delivery by Participant of written notice of such material breach by ERCOT and must prosecute such work or other efforts with reasonable diligence until the breach is cured. Provided further that if a material breach, regardless of whether such breach is cured within the allotted time after notice of the material breach, occurs more than three (3) times within a twelve-month period, the fourth such breach shall constitute a Default.

(4) For any material breach other than a failure to make payment or transfer funds, the breach shall not result in a Default if the breach cannot reasonably be cured within fourteen (14) calendar days, prompt written notice is provided by the breaching Party to the other Party, and the breaching Party began work or other efforts to cure the breach within three (3) Business Days after delivery of the notice to the breaching Party and prosecutes the curative work or efforts with reasonable diligence until the curative work or efforts are completed.

(5) If, due to a Force Majeure Event, a Party is in breach with respect to any obligation hereunder, such breach shall not result in a Default by that Party.

B. Remedies for Default.

(1) ERCOT's Remedies for Default. In the event of a Default by Participant, ERCOT may pursue any remedies ERCOT has under this Agreement, at law, or in equity,

subject to the provisions of Section 10: Dispute Resolution of this Agreement. In the event of a Default by Participant, if the ERCOT Protocols do not specify a remedy for a particular Default, ERCOT may, at its option, upon written notice to Participant, immediately terminate this Agreement, with termination to be effective upon the date of delivery of notice.

(2) Participant's Remedies for Default.

(a) Unless otherwise specified in this Agreement or in the ERCOT Protocols, and subject to the provisions of Section 10: Dispute Resolution of this Agreement in the event of a Default by ERCOT, Participant's remedies shall be limited to:

(i) Immediate termination of this Agreement upon written notice to ERCOT,

(ii) Monetary recovery in accordance with the Settlement procedures set forth in the ERCOT Protocols, and

(iii) Specific performance.

(b) However, in the event of a material breach by ERCOT of any of its representations, warranties or covenants, Participant's sole remedy shall be immediate termination of this Agreement upon written notice to ERCOT.

(c) If as a final result of any dispute resolution, ERCOT, as the settlement agent, is determined to have over-collected from a Market Participant(s), with the result that refunds are owed by Participant to ERCOT, as the settlement agent, such Market Participant(s) may request ERCOT to allow such Market Participant to proceed directly against Participant, in lieu of receiving full payment from ERCOT. In the event of such request, ERCOT, in its sole discretion, may agree to assign to such Market Participant ERCOT's rights to seek refunds from Participant, and Participant shall be deemed to have consented to such assignment. This subsection (c) survives termination of this Agreement.

(3) A Default or breach of this Agreement by a Party shall not relieve either Party of the obligation to comply with the ERCOT Protocols.

C. Force Majeure.

(1) If, due to a Force Majeure Event, either Party is in breach of this Agreement with respect to any obligation hereunder, such Party shall take reasonable steps, consistent with Good Utility Practice, to remedy such breach. If either Party is unable to fulfill any obligation by reason of a Force Majeure Event, it shall give

notice and the full particulars of the obligations affected by such Force Majeure Event to the other Party in writing or by telephone (if followed by written notice) as soon as reasonably practicable, but not later than fourteen (14) calendar days, after such Party becomes aware of the event. A failure to give timely notice of the Force Majeure event shall constitute a waiver of the claim of Force Majeure Event. The Party experiencing the Force Majeure Event shall also provide notice, as soon as reasonably practicable, when the Force Majeure Event ends.

(2) Notwithstanding the foregoing, a Force Majeure Event does not relieve a Party affected by a Force Majeure Event of its obligation to make payments or of any consequences of non-performance pursuant to the ERCOT Protocols or under this Agreement, except that the excuse from Default provided by subsection 8.A(5) above is still effective.

D. Duty to Mitigate. Except as expressly provided otherwise herein, each Party shall use commercially reasonable efforts to mitigate any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

Section 9. Limitation of Damages and Liability and Indemnification.

A. EXCEPT AS EXPRESSLY LIMITED IN THIS AGREEMENT OR THE ERCOT PROTOCOLS, ERCOT OR PARTICIPANT MAY SEEK FROM THE OTHER, THROUGH APPLICABLE DISPUTE RESOLUTION PROCEDURES SET FORTH IN THE ERCOT PROTOCOLS, ANY MONETARY DAMAGES OR OTHER REMEDY OTHERWISE ALLOWABLE UNDER TEXAS LAW, AS DAMAGES FOR DEFAULT OR BREACH OF THE OBLIGATIONS UNDER THIS AGREEMENT; PROVIDED, HOWEVER, THAT NEITHER PARTY IS LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY THAT MAY OCCUR, IN WHOLE OR IN PART, AS A RESULT OF A DEFAULT UNDER THIS AGREEMENT, A TORT, OR ANY OTHER CAUSE, WHETHER OR NOT A PARTY HAD KNOWLEDGE OF THE CIRCUMSTANCES THAT RESULTED IN THE SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY, OR COULD HAVE FORESEEN THAT SUCH DAMAGES OR INJURY WOULD OCCUR.

B. With respect to any dispute regarding a Default or breach by ERCOT of its obligations under this Agreement, ERCOT expressly waives any Limitation of Liability to which it may be entitled under the Charitable Immunity and Liability Act of 1987, Tex. Civ. Prac. & Rem. Code §84.006, or successor statute.

C. The Parties have expressly agreed that, other than subsections A and B of this Section, this Agreement shall not include any other limitations of liability or indemnification provisions, and that such issues shall be governed solely by applicable law, in a manner consistent with the Choice of Law and Venue subsection of this Agreement, regardless of any contrary provisions that may be included in or subsequently added to the ERCOT Protocols (outside of this Agreement).

D. The Independent Market Monitor (IMM), and its directors, officers, employees, and agents, shall not be liable to any person or entity for any act or omission, other than an act or omission constituting gross negligence or intentional misconduct, including but not limited to liability for any financial loss, loss of economic advantage, opportunity cost, or actual, direct, indirect, or consequential damages of any kind resulting from or attributable to any such act or omission of the IMM, as long as such act or omission arose from or is related to matters within the scope of the IMM's authority arising under or relating to PURA §39.1515 and PUC Subst. R. 25.365, Independent Market Monitor.

Section 10. Dispute Resolution.

A. In the event of a dispute, including a dispute regarding a Default, under this Agreement, Parties to this Agreement shall first attempt resolution of the dispute using the applicable dispute resolution procedures set forth in the ERCOT Protocols.

B. In the event of a dispute, including a dispute regarding a Default, under this Agreement, each Party shall bear its own costs and fees, including, but not limited to attorneys' fees, court costs, and its share of any mediation or arbitration fees.

Section 11. Miscellaneous.

A. Choice of Law and Venue. Notwithstanding anything to the contrary in this Agreement, this Agreement shall be deemed entered into and performable solely in Texas and, with the exception of matters governed exclusively by federal law, shall be governed by and construed and interpreted in accordance with the laws of the State of Texas that apply to contracts executed in and performed entirely within the State of Texas, without reference to any rules of conflict of laws. Neither Party waives primary jurisdiction as a defense; provided that any court suits regarding this Agreement shall be brought in a state or federal court located within Travis County, Texas, and the Parties hereby waive any defense of forum non-conveniens, except defenses under Tex. Civ. Prac. & Rem. Code §15.002(b).

B. Assignment.

(1) Notwithstanding anything herein to the contrary, a Party shall not assign or otherwise transfer all or any of its rights or obligations under this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld or delayed, except that a Party may assign or transfer its rights and obligations under this Agreement without the prior written consent of the other Party (if neither the assigning Party or the assignee is then in Default of any Agreement with ERCOT):

(a) Where any such assignment or transfer is to an Affiliate of the Party; or

(b) Where any such assignment or transfer is to a successor to or transferee of the direct or indirect ownership or operation of all or part of the Party, or its facilities; or

(c) For collateral security purposes to aid in providing financing for itself, provided that the assigning Party will require any secured party, trustee or mortgagee to notify the other Party of any such assignment. Any financing arrangement entered into by either Party pursuant to this Section will provide that prior to or upon the exercise of the secured party's, trustee's or mortgagee's assignment rights pursuant to said arrangement, the secured creditor, the trustee or mortgagee will notify the other Party of the date and particulars of any such exercise of assignment right(s). If requested by the Party making any such collateral assignment to a Financing Person, the other Party shall execute and deliver a consent to such assignment containing customary provisions, including representations as to corporate authorization, enforceability of this Agreement and absence of known Defaults, notice of material breach pursuant to Section 8(A), notice of Default, and an opportunity for the Financing Person to cure a material breach pursuant to Section 8(A) prior to it becoming a Default.

(2) An assigning Party shall provide prompt written notice of the assignment to the other Party. Any attempted assignment that violates this Section is void and ineffective. Any assignment under this Agreement shall not relieve either Party of its obligations under this Agreement, nor shall either Party's obligations be enlarged, in whole or in part, by reason thereof.

C. No Third Party Beneficiary. Except with respect to the rights of other Market Participants in Section 8.B. and the Financing Persons in Section 11.B., (i) nothing in this Agreement nor any action taken hereunder shall be construed to create any duty, liability or standard of care to any third party, (ii) no third party shall have any rights or interest, direct or indirect, in this Agreement or the services to be provided hereunder and (iii) this Agreement is intended solely for the benefit of the Parties, and the Parties expressly disclaim any intent to create any rights in any third party as a third-party beneficiary to this Agreement or the services to be provided hereunder. Nothing in this Agreement shall create a contractual relationship between one Party and the customers of the other Party, nor shall it create a duty of any kind to such customers.

D. No Waiver. Parties shall not be required to give notice to enforce strict adherence to all provisions of this Agreement. No breach or provision of this Agreement shall be deemed waived, modified or excused by a Party unless such waiver, modification or excuse is in writing and signed by an authorized officer of such Party. The failure by or delay of either Party in enforcing or exercising any of its rights under this Agreement shall: (i) not be deemed a waiver, modification or excuse of such right or of any breach of the same or different provision of this Agreement, and (ii) not prevent a subsequent enforcement or exercise of such right. Each Party shall be entitled to enforce the other Party's covenants

and promises contained herein, notwithstanding the existence of any claim or cause of action against the enforcing Party under this Agreement or otherwise.

E. Headings. Titles and headings of paragraphs and sections within this Agreement are provided merely for convenience and shall not be used or relied upon in construing this Agreement or the Parties' intentions with respect thereto.

F. Severability. In the event that any of the provisions, or portions or applications thereof, of this Agreement is finally held to be unenforceable or invalid by any court of competent jurisdiction, that determination shall not affect the enforceability or validity of the remaining portions of this Agreement, and this Agreement shall continue in full force and effect as if it had been executed without the invalid provision; provided, however, if either Party determines, in its sole discretion, that there is a material change in this Agreement by reason thereof, the Parties shall promptly enter into negotiations to replace the unenforceable or invalid provision with a valid and enforceable provision. If the Parties are not able to reach an agreement as the result of such negotiations within fourteen (14) days, either Party shall have the right to terminate this Agreement on three (3) days written notice.

G. Entire Agreement. Any Exhibits attached to this Agreement are incorporated into this Agreement by reference and made a part of this Agreement as if repeated verbatim in this Agreement. This Agreement represents the Parties' final and mutual understanding with respect to its subject matter. It replaces and supersedes any prior agreements or understandings, whether written or oral. No representations, inducements, promises, or agreements, oral or otherwise, have been relied upon or made by any Party, or anyone on behalf of a Party, that are not fully expressed in this Agreement. An agreement, statement, or promise not contained in this Agreement is not valid or binding.

H. Amendment. The standard form of this Agreement may only be modified through the procedure for modifying ERCOT Protocols described in the ERCOT Protocols. Any changes to the terms of the standard form of this Agreement shall not take effect until a new Agreement is executed between the Parties.

I. ERCOT's Right to Audit Participant. Participant shall keep detailed records for a period of three years of all activities under this Agreement giving rise to any information, statement, charge, payment or computation delivered to ERCOT under the ERCOT Protocols. Such records shall be retained and shall be available for audit or examination by ERCOT as hereinafter provided. ERCOT has the right during Business Hours and upon reasonable written notice and for reasonable cause to examine the records of Participant as necessary to verify the accuracy of any such information, statement, charge, payment or computation made under this Agreement. If any such examination reveals any inaccuracy in any such information, statement, charge, payment or computation, the necessary adjustments in such information, statement, charge, payment, computation, or procedures used in supporting its ongoing accuracy will be promptly made.

J. Participant's Right to Audit ERCOT. Participant's right to data and audit of ERCOT shall be as described in the ERCOT Protocols and shall not exceed the rights described in the ERCOT Protocols.

K. Further Assurances. Each Party agrees that during the term of this Agreement it will take such actions, provide such documents, do such things and provide such further assurances as may reasonably be requested by the other Party to permit performance of this Agreement.

L. Conflicts. This Agreement is subject to applicable federal, state, and local laws, ordinances, rules, regulations, orders of any Governmental Authority and tariffs. Nothing in this Agreement may be construed as a waiver of any right to question or contest any federal, state and local law, ordinance, rule, regulation, order of any Governmental Authority, or tariff. In the event of a conflict between this Agreement and an applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff, the applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff shall prevail, provided that Participant shall give notice to ERCOT of any such conflict affecting Participant. In the event of a conflict between the ERCOT Protocols and this Agreement, the provisions expressly set forth in this Agreement shall control.

M. No Partnership. This Agreement may not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party has any right, power, or authority to enter any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party except as provided in Section 7A.

N. Construction. In this Agreement, the following rules of construction apply, unless expressly provided otherwise or unless the context clearly requires otherwise:

(1) The singular includes the plural, and the plural includes the singular.

(2) The present tense includes the future tense, and the future tense includes the present tense.

(3) Words importing any gender include the other gender.

(4) The word "shall" denotes a duty.

(5) The word "must" denotes a condition precedent or subsequent.

(6) The word "may" denotes a privilege or discretionary power.

(7) The phrase "may not" denotes a prohibition.

(8) References to statutes, tariffs, regulations or ERCOT Protocols include all provisions consolidating, amending, or replacing the statutes, tariffs, regulations or ERCOT Protocols referred to.

(9) References to "writing" include printing, typing, lithography, and other means of reproducing words in a tangible visible form.

(10) The words "including," "includes," and "include" are deemed to be followed by the words "without limitation."

(11) Any reference to a day, week, month or year is to a calendar day, week, month or year unless otherwise indicated.

(12) References to Articles, Sections (or subdivisions of Sections), Exhibits, annexes or schedules are to this Agreement, unless expressly stated otherwise.

(13) Unless expressly stated otherwise, references to agreements, ERCOT Protocols and other contractual instruments include all subsequent amendments and other modifications to the instruments, but only to the extent the amendments and other modifications are not prohibited by this Agreement.

(14) References to persons or entities include their respective successors and permitted assigns and, for governmental entities, entities succeeding to their respective functions and capacities.

(15) References to time are to Central Prevailing Time.

O. Multiple Counterparts. This Agreement may be executed in two or more counterparts, each of which is deemed an original but all constitute one and the same instrument.

SIGNED, ACCEPTED AND AGREED TO by each undersigned signatory who, by signature hereto, represents and warrants that he or she has full power and authority to execute this Agreement.

Electric Reliability Council of Texas, Inc.:

By: _____

Name: Michael G. Grable

Title: VP & General Counsel

Date: 11 MAR 2008

Participant:

USE OPTION 1 IF PARTICIPANT IS A CORPORATION

By: _____

Name: Michael McBride
Title: Manager/Member
Date: October 9, 2007

USE OPTION 2 IF PARTICIPANT IS A LIMITED PARTNERSHIP

By: _____, s General Partner for Participant
Name:
Title:
Date:

Market Participant Name: Hwy 3 MHP, LLC
Market Participant DUNS: 786106208